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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion and findings of fact of the Court of Claims (Appendix A, *infra*, pp. 1a–39a) are reported at 343 F. 2d 914.

JURISDICTION

The judgment of the Court of Claims was entered on April 16, 1965 (App. A, *infra*, p. 39a), and a motion for rehearing was denied on July 16, 1965. By orders dated October 15 and November 15, 1965, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 13, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether respondent is entitled to a refund of excise taxes which it concededly owed to the United States, solely because the Internal Revenue Service erroneously had ruled that its competitor was not liable for the tax on sales of a similar product and respondent thereafter sought but was not granted a like ruling.

STATUTES AND REGULATIONS INVOLVED

Section 7805(b) of the Internal Revenue Code of 1954:

> *Retroactivity of Regulations or Rulings.*—The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect. [26 U.S.C. 7805(b).]

Other pertinent portions of the Internal Revenue Code of 1954 and the Regulations thereunder are set forth in Appendix B, *infra*, pp. 40a–44a.

STATEMENT

Respondent IBM and Remington Rand were, during the years here in question, the two principal competitors in the manufacture, sale, and leasing of electronic computing systems. Until April 1955, both companies collected from their customers and paid to the United States the 10 percent excise tax imposed by the Internal Revenue Code on the sale or lease of "business machines." Internal Revenue Code of 1954, § 4191; Int. Rev. Code of 1939, § 3406(a)(6).

On April 13, 1955, Remington requested a ruling from the Commissioner of Internal Revenue that certain of its computers were not subject to this tax. Two days later the Commissioner issued such an individual letter ruling in the form of a short telegram to Remington, which thereafter ceased collecting the tax from its customers. Both parties to this litigation concede that this ruling was erroneous and that both Remington's and IBM's computers here in question were in fact taxable "business machines."

IBM learned about this unpublished ruling through its customers and on July 13, 1955, wrote the IRS requesting a similar ruling for its competing computer. IBM's letter was captioned, "Urgent! Please Expedite." IBM also filed a claim for refund of the more than $5,800,000 in excise taxes paid during the preceding four years. Remington thereafter filed a similar refund claim for excise taxes paid from January 1, 1952, to the date of its ruling, and in July 1956 received an $86,000 refund.

On May 1, 1957, the IRS informed Remington, by letter, that after "further consideration" it had concluded that Remington's computers were taxable business machines. After conducting conferences requested by Remington, the Service formally revoked, prospectively, Remington's letter ruling effective February 1, 1958. A special excise tax statute prohibited the Commissioner from retroactively revoking Remington's ruling because it had "parted with possession or ownership" of the computers without passing the tax on to its customers, "relying upon the ruling" "that the sale or lease of such article was not taxable."

Revenue Act of 1926, Sec. 1108(b); see also App. B, *infra*, p. 43a.

The Commissioner did not reach a decision on IBM's 1955 requests until November 26, 1957, shortly before he revoked the Remington ruling. The Service then informed IBM that "after extensive study," it had concluded that IBM's computers were taxable business machines. In the interval IBM continued to pay the tax and pass it on to its customers.

While IBM concedes that the Commissioner is correct on the merits and that its computers were at all times subject to the tax, it brought the instant suit for refund of more than $13,000,000 in excise taxes paid between June 1951 and January 1958 (*i.e.*, both before and after Remington received its ruling in April 1955). The Court of Claims (one judge dissenting) held that although the taxes here in question were otherwise due under the relevant taxing statute, IBM was nevertheless entitled to a refund solely because its competitor Remington had erroneously been excused from paying the tax. The court reached this conclusion despite the fact that IBM failed to offer any proof that it had acted to its detriment in reliance on Remington's unpublished ruling or suffered any competitive disadvantage. The court found that the Commissioner had abused the discretion vested in him by § 7805(b) of the 1954 Code to make his rulings retroactive, in refusing to give IBM "equality of treatment", *i.e.*, by not extending to it the same erroneous treatment given to Remington. Under this decision it is estimated that IBM is entitled to recover approximately $11,000,000 of tax originally passed on to 3,190

customers (which it presumably will refund to them) and approximately $250,000 of tax imposed on its use of its own computers. App. A, *infra,* pp. 1a–4a, 5a, 8a–21a, 30a–39a.

REASONS FOR GRANTING THE WRIT

The Court of Claims allowed IBM to recover more than $11,000,000 in taxes, for which it concededly was otherwise liable, solely because the Internal Revenue Service had erroneously ruled that IBM's competitor was not subject to the same tax. The court thus permitted IBM to escape taxes which it owed solely because of an unpublished ruling issued to another taxpayer, upon which IBM did not have the right to rely and did not in fact rely. This decision is inconsistent with the decisions of this Court and of courts of appeals defining the scope and effect of Internal Revenue Service rulings and with the policy which such decisions reflect; and, if allowed to stand, will pose a serious threat to the system under which the Service each year issues thousands of letter rulings for the guidance of the particular taxpayers to whom issued on the assumption that any error in favor of an individual taxpayer will involve only limited loss to the revenue.

1.(a) This Court held last Term in *Dixon* v. *United States,* 381 U.S. 68, that even a taxpayer who had relied on a published ruling of general applicability could not thereby avoid a tax for which he was liable under a correct interpretation of the law.[1] There the

[1] While *Dixon* was not decided until after the Court of Claims decision in the instant case, it was brought to the Court of Claims' attention in a petition for rehearing.

Commissioner initially had acquiesced in a Tax Court decision favorable to a taxpayer; he subsequently revoked his published acquiescence retroactively as to most taxpayers (including Dixon and his associates) but prospectively as to a certain group of taxpayers. The Court stated (pp. 72–73) that the Commissioner "is empowered retroactively to correct mistakes of law in the application of the tax laws to particular transactions * * * even where a taxpayer may have relied to his detriment on the Commissioner's mistake. * * * Congress, not the Commissioner, prescribes the tax laws. * * * [T]he Commissioner's acquiescence in an erroneous decision, published as a ruling,[2] cannot in and of itself bar the United States from collecting a tax otherwise lawfully due." The fact that the taxpayers had entered into a large number of transactions "in express reliance upon the Commissioner's published acquiescence" was immaterial; they "were not justified in relying on the acquiescence as precluding correction of the underlying mistake of law and the retroactive application of the correct law to their case" (p. 76). With regard to the Commissioner's decision to give his revocation prospective effect as to certain taxpayers, the Court stated that "Congress has seen fit to allow the Commissioner to correct mistakes of law, and in § 7805(b) [the statutory provision upon which the Court of Claims relied

[2] Until 1953 the announcements of acquiescences published in the Cumulative Bulletin were given ruling numbers, as were all other documents published in the Bulletin. After the institution of the Revenue Ruling series in 1954 this practice was abandoned. See *Dixon* v. *United States*, *supra*, at 75, fn. 8.

in this case] has given him a large measure of discretion in determining when to apply his corrections retroactively" (p. 80).[3]

This reasoning is equally applicable in the present case and compels the conclusion that IBM cannot escape the taxes which it owes on the ground that the Commissioner erroneously relieved another taxpayer of a similar liability. Indeed, the government's case here is stronger than it was in *Dixon* in two significant respects.

(i) Although in *Dixon* the taxpayers entered into the transactions in reliance upon the Commissioner's ruling, here IBM neither had the right to rely nor in fact took detrimental action in reliance on Remington's ruling. See *infra*, p. 13.

(ii) *Dixon* involved an acquiescence which the Court treated as a published ruling intended for the guidance of all taxpayers similarly situated, and not a letter ruling to a particular taxpayer such as was issued to Remington in the present case, which is specifically intended by the Service to be for the guidance only of that particular taxpayer.

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[3] See also *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180, 183–186; *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134–135; *Helvering* v. *Reynolds*, 313 U.S. 428; *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 686; *Weller* v. *Commissioner*, 270 F. 2d 294, 299 (C.A. 3), certiorari denied, 364 U.S. 908; *Goodstein* v. *Commissioner*, 267 F. 2d 127, 132 (C.A. 1); *Minchin* v. *Commissioner*, 335 F. 2d 30, 32–33 (C.A. 2); *State Farm Mutual Automobile Ins. Co.* v. *United States*, 314 F. 2d 363, 368 (C.A. 7), certiorari denied, 375 U.S. 835; *Pomeroy Cooperative Grain Co.* v. *Commissioner*, 288 F. 2d 326, 330 (C.A. 8).

795-394—65——2

Under the settled practice of the Internal Revenue Service, there is a sharp difference, both with respect to their manner of promulgation and their effect, between unpublished letter rulings and published Revenue Rulings. At the request of a particular taxpayer, the Service (although not required to) will ordinarily issue a letter ruling to him indicating the tax consequences of a proposed transaction. The IRS processed nearly 39,000 such individual requests during the last fiscal year. Commissioner of Internal Revenue 1964 Annual Report, p. 4. Because of the large number of such requests the authority to issue letter rulings has necessarily been delegated to many subordinates, and a large number of such rulings inevitably are issued after relatively brief consideration, in order to meet taxpayers' needs for a timely response. Certain of these letter rulings having precedential value are subsequently published in revised form as Revenue Rulings in the Cumulative Bulletin. Before a letter ruling is published as a Revenue Ruling, it is subjected to more intensive analysis and approved at a much higher administrative level within the Internal Revenue Service than an ordinary letter ruling.[4] Moreover, the parties and transactions are disguised and the facts are often changed to some extent in order better to illustrate the principle of law involved. Only 348 such Revenue Rulings were published in 1964. *Id.* at p. 5.

The IRS has made it clear that an unpublished ruling is intended only for the benefit of the particular

[4] Therefore, references to unpublished rulings mean those that have not been published by the IRS, regardless of whether they have been published by a commercial tax service.

taxpayer to whom it is addressed and that taxpayers generally may not rely upon letter rulings issued to others. Thus, the Service has explained that only the taxpayer "to whom the ruling was originally issued" may rely upon it, and even he may do so only if he has "acted in good faith in reliance upon the ruling" so that its "retroactive revocation would be to his detriment";[5] and that "[n]o unpublished ruling * * * will be cited or relied upon * * * as a precedent in the disposition of other cases."[6] A published Revenue Ruling, on the other hand, is intended to serve as a "precedent" for the "guidance of taxpayers," and the Service has announced that such rulings "ordinarily are not revoked or modified retroactively" so that taxpayers "may rely upon such [published] rulings" and need not request a specific ruling for their particular case. App. B, *infra*, pp. 44a, 41a, 43a. This Court has noted more than once, however, that the Service has explicitly warned taxpayers that even such published pronouncements are merely "for the information of taxpayers and their counsel as showing the trend of official opinion" and "do not commit the Department to any

[5] App. B, *infra*, p. 42a. Even then the IRS reserves the right to revoke a private letter ruling retroactively in "rare or unusual circumstances." *Ibid.*

[6] App. B, *infra*, p. 44a. The procedural regulations and the Cumulative Bulletins quoted herein and reprinted in App. B are cited in order to demonstrate the present scope and nature of the ruling program. Therefore, we have used their current versions rather than those in effect in 1955. Since IBM did not in fact rely upon Remington's private ruling, no question is presented whether the 1955 version (which was substantially the same as the current version) was adequate to put IBM on notice that it was not entitled to rely upon it.

interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury." *Dixon* v. *United States,* 381 U.S. at 73; *Helvering* v. *New York Trust Co.,* 292 U.S. 455, 468.

If, as *Dixon* stated, even a taxpayer's reliance upon a published ruling will not preclude the Commissioner from subsequently revoking it retroactively so as to subject the relying taxpayer to a tax which it owes, *a fortiorari* a taxpayer cannot escape taxation because of an erroneous ruling addressed to another taxpayer upon which it did not and was not entitled to rely.

(b) The Court of Claims attempted to avoid the force of the foregoing arguments by stating that it was not holding that IBM was entitled to rely on the Remington ruling. Instead, it held that IBM was entitled to "equality of treatment" with Remington; and that in ruling that IBM had always been subject to the tax rather than only prospectively (as in the ruling correcting the error in favor of Remington) the Commissioner had abused his discretion under Section 7805(b) to determine whether particular rulings should be applied retroactively. App. A, *infra,* pp. 9a–11a, 17a–21a. Under that section the Commissioner has authority to "prescribe the extent, if any, to which any ruling * * * shall be applied without retroactive effect." But nothing in the language, purpose or legislative history of Section 7805(b) indicates that the "large measure of discretion [Congress gave to the Commissioner in Section 7805(b)] in determining when to apply his corrections retroactively" (*Dixon, supra,* p. 80) was designed to require the Commissioner to extend

equality of treatment to a taxpayer who, like IBM, had never been entitled to rely and had not in fact relied upon a prior erroneous ruling. We know of no legal principle that compels the Commissioner, once he has erroneously permitted one taxpayer to escape liability, to compound the error and permit another similarly to escape liability in the name of "equality of treatment." While equal treatment is an important element of the administration of our tax laws, there is nothing in this principle that demands equality of erroneous treatment—particularly where, as here, the one taxpayer did not detrimentally rely upon the erroneous treatment given to the other (see *infra*, p. 13).

The erroneous-but-equal standard of tax liability propounded by the court below is fraught with alarming ramifications. Tens of millions of tax returns involving hundreds of millions of transactions are audited each year throughout the country. Obviously, it is desirable to achieve nationwide uniformity of tax treatment of all taxpayers with respect to similar transactions, and there is need for constant vigilance toward that end. But this desideratum is no more perfectly attainable in the field of tax administration than in any other area calling for the application of complex statutory provisions to manifold factual situations. As a practical matter, there will inevitably occur differences in treatment, both at the administrative and the judicial levels, but the inconsistencies may hardly be characterized as unlawful discrimination.

Moreover, instead of achieving "equality of treatment" among taxpayers similarly situated, as the Court of Claims professed to be doing, the decision below produces inequality. The taxpayer here was "entitled to the same treatment as all other taxpayers similarly situated, *i.e.*, without rulings, no more and no less". *Weller* v. *Commissioner*, 270 F. 2d 294, 299 (C.A. 3), certiorari denied, 364 U.S. 908. Although the court below stressed the fact that IBM formally requested a ruling similar to Remington's erroneous ruling, we believe there is no rational distinction between taxpayers who seek "equal treatment" by requesting an advisory ruling and those who seek "equality" by resisting a deficiency determination or claiming a refund.

The fact that in the present case IBM, upon learning of Remington's ruling, itself applied for a ruling, does not justify the lower court's decision. The Court of Claims conceded that one taxpayer may not rely upon another taxpayer's ruling. App. A, *infra*, pp. 19a–20a. Compare *Bornstein* v. *United States*, 345 F. 2d 558 (Ct. Cl.). We believe that the same reasoning that supports that conclusion also proves that a taxpayer (like IBM) which (regardless of the reason) has not received a favorable ruling cannot invoke another taxpayer's ruling. The Internal Revenue Service does not—and believes that without substantially altering the structure of the present system it cannot—give each ruling request the study it would require if it were to govern the tax liability of taxpayers other than the one under consideration. The

Service is not required to issue a ruling in any particular case, with limited exceptions not relevant here, and has warned taxpayers that they may not rely upon unpublished rulings issued to other taxpayers. In this context a taxpayer (like IBM) who requested but was denied a favorable ruling is in no better position than a taxpayer who never requested a ruling at all. Neither of them can avoid his own tax liability because of a ruling given to another taxpayer.

(c) IBM did not act to its detriment in reliance upon Remington's unpublished ruling. It continued to pay the tax and pass it on to its customers as part of the price or rent for its computers during the entire period here in question. The only amount which IBM paid out of its own pocket was approximately $250,000 representing tax on computers it used itself. Even as to this amount IBM did not take any detrimental action in reliance on Remington's ruling. There was no one to whom IBM could have passed on the tax, and IBM does not contend that it would not have used the machines if it had known that it would not get the benefit of the Remington ruling.

The only damage IBM could have suffered would have been a competitive disadvantage vis-a-vis Remington from April 1955 to February 1958, the period during which Remington did not pay and pass on the tax and IBM did. The government invited IBM to introduce proof that it lost business or was otherwise injured by this competitive disadvantage, but IBM presented no evidence on that point. App. A, *infra*, pp. 20a–21a, 22a, 24a–25a. In fact, the record indi-

cates that before 1955 IBM's computer sales and rentals were approximately 60 times as large as Remington's and that during the period Remington's ruling was in effect IBM's computer revenues nearly doubled.[7]

2. The court's basic holding that a taxpayer may escape liability for a tax it owes because of an erroneous ruling given to another taxpayer has far-reaching implications.[8] Indeed, as the Court of Claims itself noted (App. A, *infra*, pp. 18a–19a), the underlying rationale of the instant decision has been the basis for other decisions of the Court of Claims and the district courts. *Exchange Parts Co. of Fort Worth* v. *United*

[7] These figures can be computed from the lower court's findings of fact as follows: For a period of between 3 and 4 years prior to the Remington ruling the two companies average monthly payments of the 10 percent excise tax on computer revenues were: IBM approximately $121,000, Remington approximately $2,000. (The portion of Remington's claim for refund that related to items other than computers was denied and is not relevant to this case.) For a 32 month period after Remington received its ruling, IBM's average monthly excise tax payments on its computer revenues rose to approximately $234,000. App. A, *infra*, pp. 37a–38a.

[8] In *Knetsch* v. *United States*, 348 F. 2d 932 (Ct. Cl.) taxpayers who had not requested rulings argued that the Court of Claims' "doctrine of equality of treatment" required the Commissioner to give them a refund because it had given refunds to other similarly situated taxpayers. Although the court stated that its *IBM* decision "was based on the court's evaluation of the particular circumstances in that case" (p. 940, fn. 14), it denied the taxpayers' claims on the ground that the treatment they sought had not in fact been afforded other taxpayers (p. 940). The court declined to decide whether, if the taxpayers had been treated unequally, it would have applied the *IBM* rationale despite the fact that neither the taxpayers in question nor the taxpayers who had allegedly received more favorable treatment had requested or obtained rulings.

States, 279 F. 2d 251 (Ct. Cl.); *Connecticut Ry & Lighting Co.* v. *United States,* 142 F. Supp. 907 (Ct. Cl.); *Brecklein* v. *Bookwalter,* 231 F. Supp. 404 (W.D. Mo.), on appeal to C.A. 8; *City Loan and Savings Co.* v. *United States,* 177 F. Supp. 843, 851 (N.D. Ohio), affirmed on other grounds, 287 F. 2d 612 (C.A. 6). Even if the decision is limited to those taxpayers who have applied for rulings, the court would apparently permit a taxpayer to claim the more favorable treatment erroneously accorded another taxpayer by filing a request for a ruling years later; the court held that IBM's July 1955 request for a ruling entitled it to a refund of all taxes paid after January 1, 1952. App. A, *infra,* p. 21a. Moreover, the courts may reason that if taxpayers are entitled to equality, they also are entitled to discover how other taxpayers have been treated. Such a view would result in extensive discovery of documents filed with the IRS by other taxpayers as well as the raising at trial of collateral issues unrelated to the proper interpretation of the Internal Revenue Code and Treasury Regulations.

The Service's letter ruling system is beneficial both to taxpayers and to the administration of the revenue laws. It aids taxpayers because there are many large and complex transactions that might never take place unless the participants could quickly obtain an advance ruling on their tax ramifications. It improves the administration of the revenue laws because such advisory rulings tend to decrease the amount of litigation, simplify the work of auditing agents who review transactions covered by a ruling, and give the Service

valuable information as to the types of transactions that taxpayers currently are planning.

The Service is deeply concerned over the possibility that rulings given to particular taxpayers may enable other taxpayers, including those who did not even rely on such rulings, to escape taxes which they owe. The Commisioner has advised that if this decision stands he would have to reexamine the present ruling program with a view to increasing the study given to a question before a ruling is issued to any taxpayer and limiting the authority to grant rulings to a smaller group of high level employees. Such changes would undoubtedly reduce substantially the number of rulings that could be issued to taxpayers and also increase the time required to process a ruling. The present decision thus poses a serious threat to a practice which enables taxpayers to obtain the speedy rulings which they need to guide them in planning their transactions, and which improves the administration of the revenue laws.

CONCLUSION

Because the decision below poses a serious threat to the continued operation of the Commissioner's important rulings program and is in conflict with decisions of this Court and the courts of appeals, we respectfully submit that this petition for a writ of certiorari should be granted.

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DECEMBER 1965.

APPENDIX A

In the United States Court of Claims

No. 36–61

(Decided April 16, 1965)

INTERNATIONAL BUSINESS MACHINES CORPORATION

v.

THE UNITED STATES

Before COWEN, *Chief Judge,* LARAMORE, DAVIS and COLLINS, *Judges.*

OPINION

DAVIS, *Judge,* delivered the opinion of the court:

International Business Machines Corporation (the taxpayer) and Remington Rand were, in the years 1951–1958, the two competitors in the manufacture, sale, and leasing of larger electronic computing systems. Before mid-April 1955, both companies paid on these articles the ten percent excise tax imposed by Section 3406(a)(6) of the Internal Revenue Code of 1939 and its replacement, Section 4191 of the 1954 Code, for the sale or lease of "business machines"[1]. On April 13, 1955, Remington Rand requested a ruling from the Commissioner of Internal Revenue that certain of its computing devices (including the Univac 120 and 60) were not subject to this tax. Two days later, April 15th, the Commissioner issued such a pri-

[1] These sections list, by type, a considerable number of machines and devices, from "adding machines" to "time recording devices."

vate ruling in the form of a short telegram to Remington Rand. Having learned through its customers of this determination, the taxpayer sought, on July 13th, a similar ruling for its competing computer (Type 604) which was identical in all significant respects with the Univac systems. Plaintiff's letter was captioned "Urgent! Please Expedite", and it closed with this sentence: "In view of the extreme urgency of this matter, your immediate ruling, wire collect, is respectfully requested." The information submitted with this letter was at least as extensive as that in Remington's application of April 13th. Shortly after making this request, plaintiff also filed, on July 29th, a refund claim (in the amount of $5,832,444.41) for the excises paid from June 1, 1951, to May 31, 1955. Late in September 1955, Remington filed a comparable refund claim (of $300,000) for similar taxes paid from January 1, 1952, to April 30, 1955.

The Commissioner did not act on the taxpayer's request for a ruling, or on its refund claim, for well over two years. During this period he did not seek more information from, or communicate with, the taxpayer which continued to pay the excise taxes on its computers. In July 1956, however, Remington received a refund of over $86,000 on its refund claim for the period from 1952 to April 1955; and, of course, that company did not pay the excise taxes on the transactions completed after issuance of the private ruling of non-coverage in April 1955.

On May 1, 1957, the Internal Revenue Service wrote to Remington that, having "had occasion to give further consideration to the question of the taxability of electronic calculating or computing equipment", the Service had concluded that such devices were taxable as business machines and therefore it proposed to revoke, *prospectively*, "our telegraphic ruling to you of

April 15, 1955." But, the Service continued, "we will withhold further action on the matter for a period of thirty days from the date of this letter in order to afford you an opportunity, should you so desire, of submitting a protest or requesting a hearing in the case." On May 31st Remington asked for a conference, which was held on June 25th. A month later, on July 25th, Remington summarized in writing its arguments against revocation of the favorable decision of April 1955. It was not until December 3, 1957, that the Service wrote Remington that it had finally concluded the Univac 120 and 60 machines were taxable, but that this new ruling would apply only to sales made and leases in effect "on and after the first day of the first month which begins thirty days after the date of this letter", *i.e.*, the machines would not be deemed taxable until February 1, 1958. As a result of this ruling and the refund made in 1956, Remington was permitted to dispose of its Univac computers, for the six-year span from the beginning of January 1952 to the end of January 1958, without paying the excise.

Some days before the letter to Remington revoking the earlier ruling, the Service informed the plaintiff, on November 26, 1957, that, "after extensive study of the question of the taxability of electronic calculating or computing equipment," it had decided that the plaintiff's equipment "herein involved and similar equipment" were taxable as business machines. The Service's letter observed that "the manufacturer of the machines which compete with and are similar to the taxable machines herein involved [*i.e.*, Remington Rand] * * * is being appropriately advised by us regarding the taxability of such machines of its manufacture." This letter of November 26, 1957, constituted the Service's response to IBM's application of

July 13, 1955, for a ruling freeing its computers from the tax.

To protect its interests, the taxpayer filed (in April 1958) a second refund claim for the subsequent period from June 1, 1955 to January 31, 1958. On February 3, 1959, the Service disallowed both of the taxpayer's refund claims. Plaintiff was thus held liable for the excise tax for the full period from June 1951 through January 1958—roughly the same period for which Remington had been relieved of the tax. This suit was timely brought on February 1, 1961, to recover $13,335,762.11, said to have been paid during those six and one-half years. Plaintiff does not deny that its computers are "business machines" under Section 3406 of the 1939 Code and Section 4191 of the 1954 Code. Its position is that the Internal Revenue Service's conduct toward it, in contrast to the treatment of Remington Rand's identical machines for the same period, invalidates the excise taxes levied under those Code sections on the IBM equipment.

I

The Government denies that the plaintiff has standing to sue for any but a small portion of the claimed refund. Section 6416(a)(1) of the 1954 Code specifies that "no credit or refund of any overpayment of" the manufacturers' tax shall be allowed or made unless the claimant establishes either that he has not passed on the tax or has repaid the tax to his purchaser or has filed with the Internal Revenue Service the "written consent" of the ultimate purchaser to the allowance of the credit or the making of the refund. (Section 3443(d) of the 1939 Code sets forth similar requirements.) When this suit was begun on February 1, 1961, plaintiff did not file or have such customer consents; but it did assert that it would submit the

necessary papers once its claim had been allowed. The Government moved to dismiss on the ground, among others, that the taxpayer could not sue for taxes passed on to its vendees unless it had their consents on hand before the expiration of the two-year limitation period for refund suits (February 3, 1961). The court denied the motion without prejudice and remanded the case for a development of the facts on this issue, as well as on the merits.

It has now been determined that, of the total sum which plaintiff seeks in this litigation, almost $252,000 represents excises paid by plaintiff on computers directly put to its own use; this amount was not passed on to others but was wholly absorbed, and the taxpayer is concededly entitled to sue for its recovery.

After April 30, 1963 (*i.e.*, since the close of the two-year limitations period), the taxpayer obtained and filed 3,190 customer consents representing over $11,000,000 in taxes.[2] The defendant renews it attack on plaintiff's standing to claim these payments. The contention is that no consent is valid unless obtained prior to the expiration of the statutory period for bringing refund litigation.

There is no impediment, we hold, to plaintiff's right to maintain this suit for all the taxes for which customer consents have been or will be given before the amount of recovery is finally fixed. Section 6416(a)(1) limits the actual refund, to be made if plaintiff prevails, to the excises borne by it or for which it procures consents before final judgment, but the statute does not condition plaintiff's right to sue on its having received customer permission prior to suit or before

[2] The United States, a large purchaser from the taxpayer, declined to execute consents. Of the total for which taxpayer sues, over $1,250,000 represents such taxes passed on to the Government.

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the two-year limitations period expires. Congress was obviously concerned that the manufacturer not fall heir to a windfall by recovering taxes, already passed on to its vendees, which it could withhold from them against their will. For this end, the important moment would be the time of actual refund, not the institution of the action. There is no hint in the phrasing of the statute that Congress wished the assurance against a windfall to be firmly established before suit was or could be brought; and there are good reasons why that requirement should not be su perimposed. In this case, for example, there are upwards of 3,000 separate customers to whom taxpayer passed on the tax during the critical years. It is sensible to insist that, if plaintiff wins, no refund for any particular tax be given until the necessary consent is filed, but it is less sensible to demand that the taxpayer undertake the burden of gathering all the consents before the tribunal has even had a chance to decide whether there can be any recovery at all.[3] No meaningful interest would be advanced, in a case like this in which the substantive issues will have to be reached (see footnote 3), by a technical demand that the consents which are to be recognized must all have been collected at the time of suit or when the cause of action first accrued.

The Commissioner of Internal Revenue has already accepted the position we adopt. Section 6416(a)(1)

[3] Since this taxpayer absorbed some of the taxes, it clearly has a right to a determination on the merits, whatever the customers do. The court will not find itself in the position of deciding the case in plaintiff's favor but being unable to order recovery because no consents can be obtained. In addition, plaintiff alleged in its petition that it stood ready to obtain and submit the necessary consents; the defendant's answer denied this allegation but no attempt was made to show that plaintiff could not obtain at least one consent.

applies equally to claims for administrative refunds and to refund actions. See *United States* v. *Jefferson Electric Mfg. Co.*, 291 U.S. 386, 395, 398, 400 (1934). In 1958, the Commissioner formally ruled that the consent provision has "no relation to the timely filing of a claim." The requirement "does not mean that the written consents must be attached to or submitted with the claim or that failure to do so renders the claim faulty so far as timely filing is concerned. Like any other evidence necessary to support a claim, written consents of ultimate purchasers may be filed with the claim or subsequent thereto." *Rev. Rul.* 58–563, 1958–2 Cum. Bull. 892, 893. Since the statute deals interchangeably with administrative and judicial claims, there is no reason why this authoritative administrative interpretation should be confined to refunds by the Service or why we should reject its teaching. The trend in the courts has not been otherwise; they have generally held no more, in a case like this, than that a taxpayer's ultimate recovery is conditioned upon persuading the judge that he has absorbed the tax or secured the necessary consents. *United States* v. *Jefferson Electric Mfg. Co., supra; Gumpert* v. *United States,* 155 Ct. Cl. 721, 723–26, 296 F. 2d 927, 928–29 (1961); *McGowan* v. *United States,* 296 F. 2d 252 (C.A. 5, 1961); *United States* v. *Spokane Rodeo, Inc.*, 254 F. 2d 377 (C.A. 9, 1958); *Royce* v. *Squire,* 168 F. 2d 250, 251 (C.A. 9, 1948). With that result we of course agree.

The Third Circuit's ruling in *Sharp & Dohme, Inc.* v. *United States,* 144 F. 2d 456 (C.A. 3, 1944), though close, does not conflict with our view. The dividend tax in that case was imposed upon the stockholder, but was to be withheld by the paying corporation. National Industrial Recovery Act, 48 Stat. 195, 206. The stockholders could undoubtedly seek a refund

themselves. But the court held the company (the withholding agent) unable to sue for any tax as to which it had not been given a consent before the expiration of the limitations period. This holding was founded, in substantial part, on the withholding agent's lack of any basic personal interest, since it was a mere collector. The tax in our case, on the other hand, was imposed on the manufacturer (the plaintiff) which alone can sue for refund (*Dow Jones & Co.* v. *United States,* 130 Ct. Cl. 696, 698, 128 F. Supp. 748, 750 (1955)). As the taxpayer, plaintiff has the direct personal interest lacking in *Sharp & Dohme, Inc.* Moreover, that decision was handed down long before the Commissioner of Internal Revenue interpreted the refund provisions of the Code to permit consents to be filed after limitations has run. That later administrative exposition has significantly changed the legal climate.

II

In defending on the merits, the Government invokes a set of simple propositions: Since the taxpayer concedes that its equipment is a "business machine" under Section 3406(a)(6) of the 1939 Code and Section 4191 of the 1954 Code, the consequence must be that the tax was properly imposed, that there was no overpayment, and that no refund can be had; moreover, this taxpayer cannot rely on the erroneous private ruling given in April 1955 to Remington Rand, a separate taxpayer, and similarly the Government is not bound, in its relations with this taxpayer, by that incorrect *ad hoc* interpretation. The leitmotif of this defense is that taxpayers can never avoid liability for a proper tax by showing that others have been treated generously, leniently, or erroneously by the Internal Revenue Service—each individual must rest, in every instance, on the validity of his own position, under the

applicable taxing provision, independently of the others'.

Though our tax law often takes that stance (see *e.g.*, *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 686 (1962)), the rule is not universal. Congress can direct the Service and the courts to take account, in a specified area, of discrimination, of equality of treatment, and of the tax burdens imposed on competitors or persons in the same or a comparable situation. Where that is what Congress has declared, the policy of the tax law emphasizes, in that particular sector more than in the rest of the tax field, the component of equal treatment; courts are then bound to vindicate that special interest just as they are, generally, to see that the uniform taxes Congress has sought to levy are paid. Curbing tax collection in the interest of equality, where Congress has so decreed, is as much a part of the internal revenue laws as the affirmative exaction of taxes. As Judge Learned Hand said in a similar connection, "the notion that the 'policy of a statute' does not inhere as much in its limitations as in its affirmations, is untenable." *Borella* v. *Borden Co.*, 145 F. 2d 63, 65 (C.A. 2, 1944), *aff'd*, 325 U.S. 679 (1945).[4]

With respect to Internal Revenue Service rulings and regulations, the Congressional mandate does direct administrative and judicial attention to this factor of equality (among others). Section 7805(b) of the 1954 Code provides:

> (b) *Retroactivity of Regulations or Rulings.*—The Secretary or his delegate may pre-

[4] The impact of statutes of limitations is another example of a Congressional policy cutting across the general policy of collecting the taxes demanded by the tax-imposing provisions of the Code. See, also, footnote 6, *infra*.

> scribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.[5]

This section has three signal consequences for those who seek rulings from the Service. Implicit in the permission to make tax rulings prospective is Congressional authorization not to collect taxes, for the past period, which would otherwise be required by substantive taxing provisions of the internal revenue legislation. If a ruling is or should be prospective only, the past tax can no longer be said to be validly imposed even though, by itself, it falls squarely under the coverage of some tax-imposing section of the Code. For reasons of fairness, Congress has, in effect, granted a dispensation from the amount otherwise due. The tax is no longer one "imposed by the internal revenue laws" which the Service is required to "collect" under Section 6301 of the 1954 Code. Conversely, to the extent the amount of the tax has already been collected, it becomes an "overpayment" (under Section 6402(a)) which is subject to refund, despite the terms of the tax-imposing provision.[6]

Implicit, too, in the Congressional award of discretion to the Service, through Section 7805(b), is the power as well as the obligation to consider the totality of the circumstances surrounding the handing down of a ruling—including the comparative or differential effect on the other taxpayers in the same class. "The Commissioner cannot tax one and not tax another without some rational basis for the difference." *United States* v. *Kaiser,* 363 U.S. 299, 308 (1960) (Frankfurter, J., concurring). This fac-

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[5] There was a comparable provision in Section 3791(b) of the 1939 Code.

[6] One analogy is Section 1108(b) of the Revenue Act of 1926, *infra,* fn. 10. The statute of limitations is another.

tor has come to be recognized as central to the administration of the section. See *Automobile Club of Michigan* v. *Commissioner,* 353 U.S. 180, 185–86 (1957); *Exchange Parts Co.* v. *United States,* 150 Ct. Cl. 538, 543, 279 F. 2d 251, 254 (1960); *Connecticut Ry. & Lighting Co.* v. *United States,* 135 Ct. Cl. 650, 653–54, 142 F. Supp. 907, 908–09 (1956); *Wolinsky* v. *United States,* 271 F. 2d 865, 868 (C.A. 2, 1959); *Weller* v. *Commissioner,* 270 F. 2d 294, 299 (C.A. 3, 1959), *cert. denied,* 364 U.S. 908 (1960); *Goodstein* v. *Commissioner,* 267 F. 2d 127, 132 (C.A. 1, 1959); *City Loan & Savings Co.* v. *United States,* 177 F. Supp. 843, 851 (N.D. Ohio, 1959), *aff'd,* 287 F. 2d 612, 616 (C.A. 6, 1961). Equality of treatment is so dominant in our understanding of justice that discretion, where it is allowed a role, must pay the strictest heed.

The third principle inherent in Section 7805(b) is that the Commissioner's exercise of discretion is reviewable (in a proper proceeding) for abuse, in the same way as other discretionary administrative determinations. The Internal Revenue Service does not have *carte blanche.* Its choice must be a rational one, supported by relevant considerations. See *Automobile Club of Michigan* v. *Commissioner,* and the other cases cited, *supra; Lesavoy Foundation* v. *Commissioner,* 238 F. 2d 589 (C.A. 3, 1956); *Goodstein* v. *Commissioner, supra;* Lynn and Gerson, *Quasi-Estoppel and Abuse of Discretion as Applied Against the United States in Federal Tax Controversies,* 19 Tax L. Rev. 487, 509 ff. (1964).

It is plain that Section 7805(b), embodying these principles, governs plaintiff's case. The Commissioner's letter of November 26, 1957, denying the request for exemption of Type 604 computers, was a "ruling", relating to the internal revenue laws",

to which this Code provision applied. Plaintiff had sought, by its letter of July 13, 1955, an "immediate ruling" on the status of the equipment; the Service was asked to "rule on" that question, in light of the fact "that your Office recently *ruled* that the same types of machines produced by Remington Rand, Inc., are not subject to the Manufacturers' Excise Tax." [Emphasis added.] The answer of the Service, in November 1957, referred to the taxpayer's letter "wherein a *ruling* is requested relative to the taxability" of the machines, and to IBM's feeling "that we should issue a specific *ruling* regarding the taxability of these machines of its manufacture." [Emphasis added.] The response then goes on to issue such a ruling, negative in character but still a ruling. The operation of Section 7805(b) is not limited, either by its terms or its history,[7] to Service rulings granting exemptions from taxation or acceding to the applicant's request. Like a judicial decision adverse to a party, a ruling against the tax payer is nevertheless a ruling. Similarly, a published ruling is not the only type of "ruling" within Section 7805(b); a private ruling is clearly included in the general category of "*any* ruling or regulation, relating to the internal revenue laws" (emphasis added).

We must thus decide whether the Commissioner of Internal Revenue abused his discretion, under Section 7805(b), when he insisted that, as to this taxpayer, his ruling of November 1957 that the computers were taxable should be retroactive rather than prospective. When we examine the agreed facts, we cannot escape holding that there was a clear abuse, that the circumstances compelled the Service to con-

[7] IBM has collected, in an appendix to its brief, a number of Service rulings, adverse to the claim of taxpayers, in which the Commissioner has invoked Section 7805(b) (or its predecessor) to make the ruling prospective only.

fine its ruling (when it was finally given) to the future period for which Remington Rand's computers were to be held taxable. Every material vector, as we gauge them, points to that resolution.

Here were the two competitors in the field of large electronic computing systems.[8] The ten percent "business machines" tax, normally passed on to the purchaser or lessee, was obviously a significant element in sales and leases. Prior to April 1955, both companies paid that tax. Remington obtained an exemption in the middle of April 1955, and this exemption continued until February 1, 1958. Shortly after learning of this ruling, IBM sought (in July 1955) an "immediate ruling" to the same effect for its identical equipment; its request was marked *"Urgent! Please Expedite"*, and the last paragraph referred to "the extreme urgency of this matter." Since the competing machines had already been freed from the tax, the Internal Revenue Service could not help but know that each month it lagged in responding to plaintiff would likely work a serious commercial detriment.[9] Nevertheless, the Service waited almost two and one-half years before it rejected IBM's request, and two months more before it made Remington's competing

[8] Though the record is not conclusive, we infer that, at the time, IBM and Remington Rand were the only two competitors as to the type of devices involved in the Service's rulings. The Service seems to have then considered them the only two competitors (see finding 13). At the least, they were by far the major competitors; the business of other companies was so much smaller that it can appropriately be disregarded. IBM's business was much greater than Remington's, but in absolute figures the latter had a substantial share of the market.

[9] The Service's letters to Remington and IBM in November and December 1957, holding that the equipment fell under the "business machines" tax, show clearly that the Government understood all along that the two companies were the interested competitors.

equipment taxable for the future. Meanwhile, IBM continued to pay the tax, as it was required to do under the law, while Remington's disposal of its devices was tax-free. The Service must have known, too, that it could not ultimately equalize the burdens of the two competitors by requiring Remington to pay the tax for the past period. Under Section 1108(b) of the Revenue Act of 1926, 44 Stat. 9, 114,[10] that manufacturer was exempted by statute from ever having to pay the tax for all the time the Service left unrevoked its telegraphic ruling of April 15, 1955, exonerating Remington computers. See *Cory Corp.* v. *Sauber,* 363 U.S. 709, 717 (1960) (dissent). The Service even heightened the potential injury by voluntarily refunding to Remington (in July 1956) almost $87,000 in excise taxes paid on the competing Univac systems from January 1, 1952 to April 30, 1955—a period of over three years before Remington received its private ruling in April 1955 and for that reason a period as to which Section 1108(b) of the 1926 Revenue Act, *supra,* would not control.

Only at the end of November 1957, did the Service tell plaintiff—without any preliminary word—that its application for a ruling of non-coverage was rejected and its machines would be held taxable for the past as well as the future. The treatment of Remington was quite different. On May 1, 1957, over half-a-year before the answer to plaintiff's request, the competitor was informed that the Service had reconsidered the telegraphic ruling of April 15, 1955, and had al-

[10] "No tax shall be levied, assessed, or collected * * * on any article sold or leased by the manufacturer, * * * if at the time of the sale or lease there was an existing ruling, regulation, or Treasury decision holding that the sale or lease of such article was not taxable, and the manufacturer * * * parted with possession or ownership of such article, relying upon the ruling, regulation, or Treasury decision."

ready concluded that "electronic calculating or computing equipment used in solving business, scientific and engineering problems" was taxable. At that time the Service told Remington that it proposed to revoke its telegraphic ruling "*and to make such revocation prospective only.* However, we will withhold further action on the matter for a period of thirty days from the date of this letter in order to afford you an opportunity, should you so desire, of submitting a protest or requesting a hearing in the case." [Emphasis added.] Thirty days later (May 31, 1957), Remington accepted the invitation and requested a conference during the week of June 24, 1957. This was held on June 25, 1957, and, another month later (July 25, 1957), Remington presented a letter on its position, emphasizing the inequity of making the proposed ruling retroactive. The Service did not actually revoke the Remington private ruling until another four months had gone by, on December 3, 1957, and even then did not make the revocation effective until February 1, 1958. This was nine months after the Service had first told Remington (on May 1, 1957) that it had decided that the telegraphic ruling of April 1955 was erroneous. The result of this new and prospective ruling was that Remington had to pay the tax only after February 1, 1958; it was wholly free of the excise from January 1, 1952, to that date, a span of over six years. Much of this time was taken up by the Service's unexplained tardiness (July 1955–May 1957) in reconsidering the issue of taxability. The additional delay, from May 1957 to February 1958, in effectuating the new ruling necessarily extended Remington's period of freedom-from-tax, under Section 1108(b) of the 1926 Revenue Act, *supra,* fn. 10; and the Service's election to make the ruling wholly prospective further increased that company's competitive

advantage.[11] In contrast, the Government has demanded that the plaintiff pay the tax on sales or leases of its identical (and competing) equipment for the entire period.

This imbalance is in no way assignable to plaintiff. It promptly tried to obtain the same treatment as Remington, stressing the urgency of its request. The Service's long delay, the defendant says, should nevertheless be pinned on IBM's failure to prod—but taxpayers, once they have initiated a request, have no obligation to harry or push the Government into action. There can be no serious contention that the plaintiff withheld any pertinent material; the Service asked for nothing more than IBM supplied and what it supplied was at least as informative and as extensive as that on which Remington received a favorable ruling in April 1955.[12] Nor should the plaintiff be chided because it coupled with its petition for nondiscriminatory treatment the formal claim that the equipment was not taxable. The Service had already so ruled in favor of the competitor, and in such circumstances a taxpayer cannot be convicted for taking the taxing authorities at their word. The Service, for its part, cannot have been misled by this argument and it is obviously in no position to complain that the point spurred it to reconsider the private ruling

[11] Section 1108(b) barred the collection of back taxes for the period during which the private ruling was outstanding, but that statute did not prevent the recovery of the taxes for January 1, 1952–April 1955 which the Service had voluntarily refunded (in July 1965) to Remington. Since re-collection was not yet barred by limitations, these amounts could have been recouped if the Service had not made its new ruling prospective only.

[12] The one document the defendant mentions as missing was a very short statement containing nothing of any relevance which was not already known to the Service.

given to Remington. No part of the extended and unsupported delay, leading to a drastic inequality, was attributable to the plaintiff.

This history exposes a manifest and unjustifiable discrimination against the taxpayer. We do not say, we need not say, that the differential treatment was deliberate or malevolent. It is enough that the direct result of the Service's course-of-conduct, though inadvertent and unplanned, was to favor the other competitor so sharply that fairness called upon the Commissioner, if he could under Section 7805(b), to establish a greater measure of equality. For all tax rulings, it is important that there be like treatment to those who should be dealt with on the same basis. *Automobile Club of Michigan* v. *Commissioner, supra,* 353 U.S. at 186, and other cases cited *supra* at p. 9. Parity in the levying of manufacturers' excises is peculiarly essential to free and fair competition. See *Exchange Parts Co.* v. *United States, supra,* 150 Ct. Cl. at 541, 279 F. 2d at 253; H. Rept. No. 708, 72d Cong., 1st Sess., pp. 31, 32 (1932). The gap here in the imposition of the "business machines" tax was so large that the Commissioner could not choose to ignore it if an appropriate remedy was at hand.

Once the Commissioner determined to deal with Remington in the way he did, the means of equalization were apparent on the face of Section 7805(b) which empowered him "to limit retroactive application to the extent necessary to avoid inequitable results." *Automobile Club of Michigan* v. *Commissioner, supra,* 353 U.S. at 184. If he were not to abuse his discretion, the Commissioner was compelled to decide that the ruling given to IBM should be "applied without retroactive effect" so as to place the two competitors on the same plane. Since Remington was being freed of the tax from January 1, 1952,

to February 1, 1958, the plaintiff, too, should have been accorded that dispensation. The Service has often announced that rulings imposing or confirming a tax will not be applied retroactively.[12] Many, but not all (see fn. 13), have concerned departures from prior published rulings, but nothing in Section 7805 (b) limits the Commissioner's authority to that particular area. If, as in this instance, other elements make nonretroactivity imperative, the statute calls for it. To opt for retroactivity where the opposite is required is an abuse of the discretion granted by the section.

The omission of the Service to do what it was compelled by the circumstances to do leads inevitably to IBM's recovery of the taxes paid for the period from January 1, 1952, to February 1, 1958 (which are covered by timely refund claims). *Cf. Lesavoy Foundation* v. *Commissioner, supra,* 238 F. 2d 589 (C.A. 3, 1956). The failure to make the ruling of nontaxability, given in November 1957, prospective from February 1st was void and erroneous because contrary to the innate requirements of Section 7805(b). Under the statute that ruling had to be prospective. It must therefore be treated as such, in the same fashion that a court, disregarding an erroneous administrative determination in the ordinary refund suit, proceeds to vindicate the requirements of the statute (or regulation). On two occasions (*Connecticut Ry. & Lighting Co.* v. *United States,* 135 Ct. Cl. 650, 142 F. Supp. 907 (1956), and *Exchange Parts Co.* v. *United States,* 150 Ct. Cl. 538, 279 F. 2d 251 (1960)) this court has allowed recovery of back taxes where the Commissioner of Internal Revenue discriminated against a

[12] Plaintiff cites over forty such instances from the published rulings of 1955–1962. Several of these appear to base nonretroactivity on prior private rulings.

taxpayer by wrongly applying the retroactive features of a ruling. Those cases involved an invalid distinction between taxpayers who had and those who had not paid the disputed tax, but the broader principle of the decisions is that a refund suit lies for the past period whenever the Service has improperly made its ruling retroactive as to the suing taxpayer.[14] We know of no holding opposed. The numerous cases saying that one taxpayer has no right to rely on an incorrect private ruling to another[15] are irrelevant; they concerned, not the discretion of the Commissioner under Section 7805(b)) where the suing tax-

[14] In those instances the court assumed or held that (a) the substantive position on taxability announced in the ruling was correct and (b) the Service could have made the ruling retroactive for all taxpayers (the latter was explicitly true of *Exchange Parts*).

Where the Service has discriminated in its ultimate ruling of taxability, *Exchange Parts* is direct authority for granting a refund to a taxpayer for a period in which he did not have any ruling in his favor either public or private. The court allowed recovery for just such a period before any ruling of non-taxability had been published and before that taxpayer had obtained private rulings—a period during which, by hypothesis, the tax was properly owing. On that point, *Exchange Parts* is on all fours with the present case.

[15] See *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 686 (1962); *Weller* v. *Commissioner*, 270 F. 2d 294, 299 (C.A. 3, 1959), *cert. denied*, 364 U.S. 908 (1960); *Goodstein* v. *Commissioner*, 267 F. 2d 127, 132 (C.A. 1, 1959); *State Farm Mutual Automobile Ins. Co.* v. *United States*, 314 F. 2d 363, 368 (C.A. 7), *cert. denied*, 375 U.S. 835 (1963); *Pomeroy Cooperative Grain Co.* v. *Commissioner*, 288 F. 2d 326, 330 (C.A. 8, 1961); *Wood* v. *Commissioner*, 39 T.C. 1, 7 (1962); *Gerstell* v. *Commissioner*, decided July 30, 1962, P. H. Memo., T. C., par. 62, 181, *aff'd per curiam*, 319 F. 2d 131 (C.A. 3), *cert. denied*, 375 U.S. 941 (1963); *Bennett* v. *Commissioner*, decided Nov. 20, 1960, P. H. Memo., T.C. par. 60,253; *Minchin* v. *Commissioner*, 335 F. 2d 30, 32–33 (C.A. 2, 1964).

payer has himself asked for a ruling, but instances in which the taxpayer simply claimed freedom from the tax on the basis of a private ruling to a separate person. We need not, and do not, depart from that settled principle since we do not decide this case on the ground that IBM had a right to invoke or rely upon Remington's private ruling of April 1955. We rest on the wholly different basis that IBM, having taken the pains to ask promptly for its own ruling, was entitled to have the Service's ruling, in response to that request, controlled by the standard of equality and fairness incorporated in Section 7805(b).

Plaintiff's statutory right to this type of equal protection is not cut off by its omission to prove that it lost business by virtue of the discriminatory treatment. The inequality inheres in the payment of the tax by IBM and its customers while Remington and its customers were allowed to go free. The injury lies in the collection of taxes which are now found not to have been collectible. No more than in the normal refund case must plaintiff show, in this suit to enforce Section 7805(b), any injury or detriment other than the payment of a tax which the Government should not retain. The Code does not demand any special or greater proof of harm as a condition of recovery for an abuse of discretion under Section 7805(b).[16] The goal of that provision, when it applies, is to outlaw "inequitable results" in taxation (*Automobile Club of Michigan* v. *Commissioner, supra*), not merely to compensate for an additional injury over and above the unequal levying of the tax. It would weaken and dilute the standard of equality Congress put into the section to add the gloss that, even though the Service violated the statute, the tax-

[16] Aside from the requirements considered in Part I of this opinion.

payer is without remedy unless he proves that he lost business or competitive position.[17] The taxpayer's claim is founded on a right granted by Congress, not merely on principles of estoppel evolved judicially as part of a limited "common law" effort to further fairness. In *Connecticut Ry & Lighting* Co. *and Exchange Parts, supra* (see footnote 14), there was no proof of any special loss, and for part of the period involved in *Exchange Parts* there was no showing of reliance on any Internal Revenue Service ruling or position.

For these reasons, the plaintiff is entitled to recover, subject to the showing called for by Part I, *supra,* the manufacturers' excise taxes paid by it, on its Type 604 computing systems, during the period from January 1, 1952, through January 31, 1958. Judgment is entered to that effect. The amount of recovery will be determined under Rule 47(c).

COWEN, *Chief Judge,* dissenting:

If we were empowered, in accordance with the dictates of natural justice, to order that the taxes paid by plaintiff be refunded because plaintiff received unfair and unequal treatment, I would readily concur in the court's decision. Despite the persuasiveness of the court's opinion, however, I would dismiss plaintiff's petition. In my view, the court's decision is contrary to the intention of Congress as expressed in the enactment of the statute upon which the court's action is predicated and departs from the rule announced in

[17] Moreover, if that were the rule, the court would presumably have to consider the position of the various customers who ultimately bore the tax and will benefit from the refund.

We also note that, when the Service makes its rulings prospective, it does not seem to have insisted that taxpayers, in order to benefit from this prospectivity, show that they have individually relied to their detriment on previous rulings or positions of the Service.

decisions which have construed that statute in actions by taxpayers who based their suits upon private rulings issued to other taxpayers. As a preliminary to the conclusion which I believe should have been reached in this case, let us review the salient facts.

First, it is undisputed and now conceded by plaintiff that the business machines, which are the subject of its suit for refund, were at all times pertinent to this action subject to the excise tax provided in Section 4191 of the Internal Revenue Code of 1954, or its predecessor.

Second, on July 13, 1955, plaintiff applied for a private ruling that its machines were not taxable on the ground that the Commissioner of Internal Revenue had, on April 15, 1955, issued a private ruling to Remington Rand that its computing machines, which were similar in all material respects to plaintiff's machines, were not subject to the excise tax. The ruling in favor of Remington Rand was revoked December 3, 1957, but, as to it, the new ruling was made applicable only for the period beginning on and after February 1, 1958. On November 26, 1957, the Commissioner, in response to plaintiff's request for a private ruling, notified plaintiff that its machines were taxable. There was no retroactive application of a private ruling issued to plaintiff or of a published ruling covering its machines.

Third, there is no evidence in the record that plaintiff closed any transactions in reliance on the private ruling given to Remington Rand, or that it suffered any competitive disadvantage as a result of the Commissioner's action.

The court recognizes that when the Internal Revenue Service revoked the private ruling given to Rand, it could not apply the ruling of revocation to Remington Rand retroactively because of the provisions of

Section 1108(b) of the Revenue Act of 1926 (quoted in footnote 10 of the court's opinion). There is no corresponding statutory provision which would have authorized the Commissioner of Internal Revenue to forgive the tax on plaintiff's sales during the period that the erroneous ruling to Remington Rand was outstanding. Nevertheless, the court holds that the Commissioner abused the discretion reposed in him by Section 7805(b) of the Internal Revenue Code of 1954, when he failed to apply the ruling given to plaintiff (that its machines were taxable) without retroactive effect so that both competitors would be placed on the same plane.[18]

The predecessor of Section 7805(b) was first enacted in substantially its present form as Section 506 of the Revenue Act of 1934, which amended Section 1108(a) of the Revenue Act of 1926. The purposes for which the new Section 506 was enacted are set forth in substantially the same language in both H. Rep. No. 704, 73d Cong., 2d Sess., at page 38 and S. Rep. No. 558, 73d Cong., 2d Sess., at page 48.

The House Report reads as follows:

> Section 506. Retroactivity of rulings: This section amends section 1108(a) of the Revenue Act of 1926, as amended, so as to permit the Secretary, or the Commissioner with the approval of the Secretary, to prescribe the extent, if any, to which any regulation, Treasury decision, or ruling relating to internal revenue taxes shall be applied without retroactive effect. The amendment extends the right granted by existing law to the Treasury Department to give regulations and Treasury decisions amending prior regulations or Treasury decisions pros-

[18] The majority places the "competitors" on the same plane retrospectively, but it does so without regard to whether any competitive disadvantage was suffered by plaintiff.

> pective effect only, by allowing the Secretary, or the Commissioner with the approval of the Secretary, to prescribe the exact extent to which any regulation or Treasury decision, whether or not it amends a prior regulation or Treasury decision, will be applied without retroactive effect. The amendment furthermore permits internal revenue rulings as well as regulations or Treasury decisions to be applied without retroactive effect. Regulations, Treasury decisions, and rulings which are merely interpretive of the statute, will normally have a universal application, *but in some cases the application of regulations, Treasury decisions, and rulings to past transactions which have been closed by taxpayers in reliance upon existing practice, will work such inequitable results that it is believed desirable to lodge in the Treasury Department the power to avoid these results by applying certain regulations, Treasury decisions, and rulings with prospective effect only.* [Cum. Bull. 1939–1 (Part 2) p. 583] [Emphasis added].

From the above-quoted language in the House Report, it seems altogether clear that Congress vested the Commissioner with the discretion to limit the retroactive application of any ruling, regulation, or Treasury decision when necessary to avoid inequities to taxpayers who have acted to their detriment in relying upon prior decisions, regulations, or rulings. Therefore, in my opinion, a showing of detriment and reliance is generally necessary to establish an abuse of discretion under Section 7805(b). See Lynn and Gerson *Quasi-Estoppel and Abuse of Discretion as Applied Against the United States in Federal Tax Controversies,* 19 Tax L. Rev. 487, 508 (1964). As stated above, plaintiff did not show that it closed any transactions in reliance on the private ruling given to Remington Rand, or that it suffered any competi-

tive disadvantages as a result of the ruling. At a pretrial conference held before our trial commissioner (para. 16 Commissioner's Memorandum of Pretrial Conference) defendant put plaintiff on notice that if its right to recover was predicated upon an alleged competitive disadvantage inflicted upon it by the Commissioner of Internal Revenue, plaintiff could support its claim only by producing evidence of sales opportunities lost because excise taxes were imposed on its machines but not upon those of Remington Rand. Plaintiff did not offer any proof on the point. Also, plaintiff did not absorb any of the excise taxes on the machines sold or leased to its customers.[19]

In a series of decisions by the First Circuit, the Third Circuit and the Tax Court, the courts were faced with actions by taxpayers, who had not received private rulings from the Internal Revenue Service. They argued that when the Commissioner revoked a previous letter ruling issued to another taxpayer, the retroactive application of that change in position as to them constituted a discriminatory abuse of the discretion granted by Section 7805(b) or its predecessor. Insofar as taxability was concerned, the situation of these taxpayers was the same or similar to that of the taxpayer who had received the ruling, and it was shown or assumed that the plaintiffs in each case had relied on the previous rulings. *Weller* v. *Commissioner,* 270 F. 2d 294 (3d Cir. 1959), *cert. denied,* 364 U.S. 908; *Estate of Bennett* v. *Commissioner,* P.H. Memo. T.C. Para. 60253 (1960); *Gerstell* v. *Commissioner,* P.H. Memo. T.C. Para. 62181 (1962), *Aff'd* 319 F. 2d 131 (3d Cir. 1963); *Goodstein* v. *Commis-*

[19] Of the total amount plaintiff seeks to recover, $251,797.45 represents taxes imposed on plaintiff's own use of its machines and $11,123,292.55 represents excise taxes passed on to its customers who purchased or rented plaintiff's machines.

sioner, 267 F. 2d 127 (1st Cir. 1959). In each case, the court held that the issuance of a ruling to a particular taxpayer was a sufficient basis for the Commissioner, in the exercise of his discretion, to apply the change in position retroactively as to taxpayers who had not received rulings. Thus, in *Weller*, the Third Circuit stated:

> Petitioners contend, however, that although the revenue ruling fails to indicate any limitation on its application, agents of the Treasury have stated to Congress that it does not intend to apply the revenue ruling retroactively to individuals who have previously been issued rulings. We need not determine whether such action if carried out would be an abuse of discretion, for *petitioners are not in the same position as those parties who have been issued rulings. They are entitled to the same treatment as all other taxpayers similarly situated, i.e., without rulings,* no more and no less. This the Commissioner has afforded them. [Emphasis added.]

The Third Circuit adhered to this rule in its affirmance of the Tax Court's decision in *Gerstell* v. *Commissioner, supra,* and in *Carpenter* v. *Commissioner,* 322 F. 2d 733 (1963).

The First Circuit reached the same conclusion in *Goodstein* v. *Commissioner, supra,* and pointed out an additional basis therefor in the following language:

> But to hold that the Commissioner is bound by rulings specifically addressed to a taxpayer other than the one whose return is questioned would severely limit the usefulness of the long established practice of private administrative rulings. * * * We are of the opinion that the Tax Court was correct in holding that insofar as * * * no individual ruling to the contrary was ever issued to the taxpayer, he cannot now assert that the Commissioner committed error

in his retroactive application of the published ruling.

I see no distinction in principle between the facts in the case before us and those in the cases cited and I would, therefore, follow the rule which they have announced.

As the First Circuit has suggested, I believe that the court's holding in this case might impair the usefulness of the long established and well-known policy of the Internal Revenue Service with respect to private rulings. The reasons for that policy inhere in the great number of such rulings which are issued yearly and the circumstances under which they are issued. The policy was first announced in 1954 in Rev. Rul. 54–172, 1954–1, Cum. Bull. 394, Section 11, and is now set forth in Treasury Regulation 601.201. Thus, it has long been the policy and it is now stated in the regulations that the Service will not, except in unusual cases, apply the revocation or modification of a ruling issued to a particular taxpayer in a retroactive way. The basis for this policy has been discussed fully and will not be repeated here. Wenchel, *Taxpayers Rulings,* 5 Tax L. Rev. 105 (1950) and Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles,* N.Y.U. 20th Inst. on Fed. Tax. 1, 26–29 (1962).

Congress has considered this problem and has demonstrated its reluctance to change or restrict the established Service policy regarding private rulings by rejecting a proposed amendment to Section 7805 of the Internal Revenue Code of 1954. The amendment provided that a taxpayer who files a tax return in reliance on an unpublished ruling issued to another taxpayer, should be treated in the same manner as if the unpublished ruling had been issued to him, provided the ruling had not been revoked by the time the return

was filed. 102 Cong. Rec. 14,682 (1956). The Senate adopted the proposed amendment but it was never acted on by the House.

As I understand, the Court's decision is principally based on the decisions of this court in *Exchange Parts Company, Inc.* v. *United States,* 150 Ct. Cl. 538 (1960) and *Connecticut Railway & Lighting Co.* v. *United States,* 135 Ct. Cl. 650 (1956).[20] I think that the facts in those cases are dissimilar and that the decisions do not control this case. In *Connecticut Railway,* the Internal Revenue Service published regulations which reversed a consistent administrative practice extending over a period of 30 years, as well as the government's published representations to the Supreme Court. In *Exchange Parts Company, Inc.,* plaintiff was one of many businesses engaged in rebuilding automobile parts. After paying the excise tax on rebuilt equipment for several years, plaintiff applied for and obtained a ruling that the articles were not taxable. In addition, there were published rulings to the same effect. Thereafter, the Commissioner reversed his position but stated that in view of his earlier published pronouncements, he would apply the new ruling prospectively, except that he would not refund any excise taxes that had been previously paid. Plaintiff's claim for refund, which covered the period for which it had paid the taxes, was rejected.

The distinguishing feature of both cases is that by virtue of private and published rulings or long standing administrative practice, each of the affected taxpayers would have been entitled to a refund of the

[20] In *Connecticut Railway* and *Exchange Parts Company,* the briefs of the parties did not contain any reference to or discussion of Section 1108(b) of the Revenue Act of 1926 and there is no indication in the court's opinions that this statute was noticed or considered.

taxes paid under the law as it had been administered by the Internal Revenue Service. The court held that in such circumstances it was an abuse of discretion for the Commissioner to discriminate against the plaintiffs in those cases solely on the basis that they had paid the taxes in suit.

The plaintiff's situation here is quite different. It applied for but did not obtain a ruling that its machines were nontaxable. The erroneous ruling issued to Remington Rand was a private ruling which covered only its machines, designated by name and number. There was no published ruling of general applicability nor was there a long standing and publicly announced administrative practice that the type of machines manufactured by plaintiff were not subject to the excise tax. The fact that plaintiff's machines were similar in all respects to those made by Remington Rand does not place plaintiff in any better position than the plaintiffs in the *Weller-Goodstein* line of cases cited above.

Upon the facts presented to us, the long delay which elapsed between plaintiff's application for a favorable ruling and the revocation of the ruling given to Remington Rand appears to have been inexcusable. The explanation offered by defendant is neither appealing nor convincing. But this is a problem of administrative management in the Internal Revenue Service and its correction should come through reforms initiated in that agency. If relief is to be granted for the kind of damage claimed by plaintiff, such relief should be provided by legislation [21] rather than by a remission of taxes lawfully due.

---

[21] Congress has denied consent to sue the sovereign in tort actions for damages predicated on an abuse of discretion. 28 U.S.C. 2680(a); see *Jayson, Application of the Discretionary Function Exception*, 24 Fed. Bar J. 153 (1964).

Equal treatment of all taxpayers who are similarly situated is a much sought-after goal. This case is an example—a deplorable example—of the fact that in many cases the goal is not attained. However, in the absence of some statutory provision which affords plaintiff relief because of the unequal treatment it received, I think the court is powerless to supply the remedy it has applied in this case.

FINDINGS OF FACT

The court having considered the evidence, the report of Trial Commissioner Mastin G. White, and the briefs and arguments of counsel, makes findings of fact as follows:

1. The plaintiff, International Business Machines Corporation, is—and at all relevant times has been—a corporation organized under the laws of the State of New York, with its principal place of business in the city of New York, New York. It is—and at all relevant times has been—engaged principally in the manufacture, sale, and leasing of business machines and data processing systems.

2. Prior to June 30, 1955, the plaintiff's principal competitor in the business of manufacturing, selling, and leasing business machines and electronic computing systems was Remington Rand, Inc. On June 30, 1955, Remington Rand, Inc., was consolidated with the Sperry Corporation, and the name of the consolidated corporation was changed to Sperry Rand, Inc. Since June 30, 1955, the plaintiff's principal competitor in the business of manufacturing, selling, and leasing business machines and electronic computing systems has been Sperry Rand, Inc. (For the sake of convenience, only the name Remington Rand will be used hereafter in the findings to refer to both corporate entities.)

3. (a) Among the electronic computing systems that the plaintiff manufactured during the period from June 1, 1951, through January 31, 1958, were those known as Type 604, Type 605, Type 607, Type 412, Type 418, Type 941, and Type 942 (hereinafter sometimes referred to as Type 604 systems). They were designed for the higher speeds and larger capacities demanded by problems of increased complexity which confront business, industry, government, and science, including problems of procurement and supply, logistics, production control, engineering development, and scientific research.

(b) Type 604 systems, as manufactured, sold, and leased by the plaintiff, are identical in all significant respects with those electronic computing systems manufactured, sold, and leased by Remington Rand, which systems are known as the Univac 120 and the Univac 60 (hereinafter sometimes referred to as Univac systems).

4. The use of the term "electronic computing systems" in the findings is not intended to connote either taxability or nontaxability of such equipment.

5. The plaintiff duly filed manufacturers' excise tax returns for the period from June 1, 1951, to January 31, 1958, with the District Director of Internal Revenue, Upper Manhattan, New York, New York, and paid the taxes, including the tax on the Type 604 systems, on a monthly basis either directly to the District Director or to banks qualified as depositaries, from which depositary receipts for Federal excise taxes were obtained and transmitted to the District Director on a quarterly basis. Each monthly payment covered the tax for the preceding month. To the extent that the taxes referred to herein were imposed on sales and rentals of electronic computing systems manufactured by the plaintiff, such taxes were collected by the plain-

tiff from its customers; to the extent that they were imposed upon the plaintiff's use of electronic computing systems, such taxes were borne by the plaintiff.

The Commissioner's Actions on Requests for Rulings

6. By a letter dated April 13, 1955 (attaching brochures relating to the machines), Remington Rand requested a ruling from the Commissioner of Internal Revenue holding that certain of its electronic computing systems, including the Univac 120 and Univac 60, were not subject to the manufacturers' excise tax imposed by Section 3406 of the Internal Revenue Code of 1939 (Section 4191 of the Internal Revenue Code of 1954).

7. On April 15, 1955, the Commissioner issued a telegraphic ruling to Remington Rand, in which it was held that the "* * * Univac Scientific, Univac 120, Univac 60 and Univac File-Computer * * * are not subject to tax under section 4191 Internal Revenue Code 1954. * * *"

8. By a letter dated July 13, 1955 (with enclosures), to the Commissioner of Internal Revenue, the plaintiff requested that it be issued a ruling holding that its Type 604 electronic computing systems were exempt from the manufacturers' excise tax imposed by Section 4191 of the Internal Revenue Code of 1954. The letter was captioned, *"Urgent! Please Expedite."* It stated as follows:

> The enclosures which I have just received from International Business Machines Corporation will be found self-explanatory.
>
> As you will note from Mr. Learson's letter to me, IBM has, on the basis of my opinion as to taxable status, treated its Types 604, 607 and 605 Machines as subject to the Manufacturers' Excise Tax, whereas it now appears that your Office recently ruled that the same types of ma-

chines produced by Remington Rand, Inc. are not subject to the Manufacturers' Excise Tax.

It will therefore be very much appreciated if you will kindly review the data furnished herewith and rule on the status of the IBM Types 604, 607 and 605 Machines, the last mentioned being known as the IBM Card-Programmed Electronic Calculator, consisting of a Type 605 Electronic Calculating Punch, a Type 412 Accounting Machine or a Type 418 Accounting Machine, and a Type 941 Auxiliary Storage Unit, any of which machines may be used independently of the others. The Types 412 and 418 Accounting Machines have also been treated as subject to the Manufacturers' Excise Tax.

In view of the extreme urgency of this matter, your immediate ruling, wire collect is respectfully requested.

9. On May 1, 1957, the Chief of the Excise Tax Branch of the Internal Revenue Service addressed to Remington Rand a letter which stated in part as follows:

> Reference is made to our telegram to you on April 15, 1955, wherein we held that the Univac Scientific, Univac 120, Univac 60, and Univac File-Computer of your manufacture illustrated and described in the brochures submitted with a letter dated April 13, 1955, from Ivins, Phillips and Barker are not subject to tax under section 4191 of the Internal Revenue Code of 1954.
>
> We have had occasion to give further consideration to the question of the taxability of electronic calculating or computing equipment, and it is our conclusion that electronic calculating or computing equipment used in solving business, scientific and engineering problems are taxable business machines under section 4191 of the Code.
>
> We propose to revoke our telegraphic ruling to you of April 15, 1955, and to make such

> revocation prospective only. However, we will withhold further action on the matter for a period of thirty days from the date of this letter in order to afford you an opportunity, should you so desire, of submitting a protest or requesting a hearing in the case. * * *

10. In a letter dated May 31, 1957, Remington Rand protested the Commissioner's announced intention to revoke its private ruling of April 15, 1955, and requested that it be afforded a conference with Internal Revenue Service representatives during the week of June 24, 1957.

11. By a letter dated June 13, 1957, Mr. R. J. Bopp, Chief, Excise Tax Branch, Internal Revenue Service, acknowledged Remington Rand's letter of May 31, 1957, and stated that the conference requested would be held at the Internal Revenue Service, Washington, D.C., on June 25, 1957, at 2 p.m.

12. In a letter dated July 25, 1957, to the Commissioner of Internal Revenue, Remington Rand summarized the arguments against revocation of its ruling that it had presented orally to Internal Revenue Service representatives at the conference of June 25, 1957. The concluding paragraph of the letter stated as follows:

> Because of the relatively high cost of Univac 120 and Univac 60 computers as contrasted to the traditional electromechanical calculator, businessmen do not purchase or lease these electronic calculators on the spur of the moment. Before a contract of sale or a lease is made involving this equipment, many months of preliminary spade work has usually been involved. Furthermore, after the contract of sale or lease has been executed it may take several months for the equipment actually to be delivered to the purchaser or lessee since the taxpayer now has a considerable backlog of

orders. As a consequence, the actual date upon which title to a computer passes to the customer merely reflects the end point of from six months to a year's negotiations and work during all of which period the customer and the taxpayer will have had a well determined price in mind for the Univac 120 or Univac 60 which is to be delivered. Accordingly, a determination by the Service to impose the tax upon sales made pursuant to contracts which have been entered into already or which will be entered into within the very near future would impose a great hardship upon the taxpayer and also upon the taxpayer's customers. In like fashion, the imposition of the tax under section 4191 on renewal leases, where the rental is not subject to upward adjustment by reason of the imposition of the tax, would be highly inequitable.

13. In a letter dated November 26, 1957, to the plaintiff's authorized representative, Mr. R. J. Bopp, Chief, Excise Tax Branch, Internal Revenue Service, stated as follows:

> This is in reply to your letter of July 13, 1955, with which you enclosed a letter dated July 12, 1955, from International Business Machines Corporation, wherein a ruling is requested relative to the taxability under section 4191 of the Internal Revenue Code of 1954, formerly section 3406(a)(6) of the 1939 Code, of the Type 604 Electronic Calculating Punch, Type 607 Electronic Calculator and Type 605 Card-Programmed Electronic Calculator which that corporation manufactures and sells or leases. Illustrations and detailed descriptions of the equipment were submitted.
>
> It is stated that the corporation has treated these machines as subject to the Federal excise tax and has accounted for the tax to the Treasury Department. It is further stated that the corporation has been informed by many of its customers that certain machines similar to those

of the corporation's manufacture are not subject to the tax, and for that reason the corporation feels that we should issue a specific ruling regarding the taxability of these machines of its manufacture.

After extensive study of the question of the taxability of electronic calculating or computing equipment we have concluded that equipment such as the equipment of International Business Machines Corporation's herein involved and similar equipment are taxable business machines within the meaning of the provisions of section 4191 of the Code. We hold that the Type 604 Electronic Calculating Punch, Type 607 Electronic Calculator and Type 605 Card-Programmed Electronic Calculator, in their entirety, are taxable business machines under section 4191 of the Code and tax at the rate of 10 per cent applies to the corporation's sales or leases of such machines.

The manufacturer of the machines which compete with and are similar to the taxable machines herein involved manufactured and sold or leased by International Business Machines Corporation is being appropriately advised by us regarding the taxability of such machines of its manufacture. We still have under reconsideration the question of the taxability of the larger electronic computing equipment such as electronic data processing machines.

14. In a letter dated December 3, 1957, to Remington Rand, the Commissioner of Internal Revenue stated in pertinent part as follows:

We have had occasion to give further consideration to the question of the taxability of this equipment of your manufacture and after due consideration of the information furnished in your letter of May 31, 1957 and a letter dated July 25, 1957, from Ivins, Phillips & Barker, we have concluded that the Univac 120 and Univac 60 machines are taxable calculating or

computing machines within the intent of section 4191 of the Code and, therefore, tax at the rate of 10 percent attaches to your sale or lease of such machines. We still have under reconsideration the question of the taxability of the Univac Scientific and Univac File-Computer.

By virtue of the authority of section 7805(b) of the Code this ruling will apply only to sales made by you on and after the first day of the first month which begins thirty days after the date of this letter and will apply to leases in effect as of that date, unless otherwise exempt.

This ruling is made to correct a certain competitive irregularity which now exists and, therefore, will apply to sales made by you on and after the effective date of the ruling and to leases in effect as of that date regardless of the fact that the sale or lease may be made by you pursuant to a purchase order or contract entered into before such date.

15. As a result of the Commissioner's ruling of December 3, 1957, Remington Rand was permitted to sell, lease, or put to its own use its Univac systems taxfree through January 31, 1958. On and after February 1, 1958, Remington Rand treated such systems as being subject to tax under Section 4191 of the Internal Revenue Code of 1954.

The Commissioner's Actions on Claims for Refund

16. On July 29, 1955, the plaintiff filed a claim for refund in the amount of $5,832,444.41 for manufacturers' excise taxes paid by it on the Type 604 systems during the period from June 1, 1951, to May 31, 1955, inclusive, which systems had been either (a) leased to customers or (b) put to a taxable use in the plaintiff's own organization.

17. On September 26, 1955, Remington Rand filed a claim for refund in the amount of $300,000 for manufacturers' excise taxes paid by it on the Univac sys-

tems during the period from January 1, 1952, to April 30, 1955.

18. By a letter dated July 30, 1956, Mr. E. C. Coyle, Jr., District Director of Internal Revenue, Buffalo, New York, duly advised Remington Rand that the refund claim referred to in finding 17 was allowed to the extent of $86,809.47, and was otherwise disallowed.

19. On April 24, 1958, the plaintiff filed a claim for refund in the amount of $7,503,317.70 for manufacturers' excise taxes paid by it on the Type 604 systems during the period from June 1, 1955, to January 31, 1958, inclusive, which systems had been either (a) sold to customers, or (b) put to a taxable use in the plaintiff's own organization, or (c) leased to customers.

20. On February 3, 1959, the District Director of Internal Revenue, in accordance with the provisions of Section 6532(a)(1) of the Internal Revenue Code of 1954, sent to the plaintiff, by registered mail, a notice that the plaintiff's claims for refund for the period from June 1, 1951, to January 31, 1958 (see findings 16 and 19), had been wholly disallowed.

Amounts Involved

21. The amount of manufacturers' excise taxes paid by the plaintiff with respect to Type 604 systems during the period from June 1, 1951, through January 31, 1958, includes $251,797.45 which was paid by the plaintiff with respect to systems directly put to its own use. This amount was not included in the price of any Type 604 systems sold or leased by the plaintiff, and was not collected by the plaintiff from any purchaser or lessee.

22. (a) The plaintiff has filed 3,190 written consents from ultimate purchasers to the making of refunds in the total amount of $11,123,292.55, representing

alleged overpayment of taxes imposed on Type 604 systems. Such consents, which were obtained during the period from April 30, 1963, to June 21, 1963, are adequate as a matter of form and (aside from the question of timeliness, as to which the parties are in disagreement) comply with Section 6416(a)(1) of the Internal Revenue Code of 1954 and the regulations promulgated thereunder. The plaintiff has not repaid any of the alleged overpayment of tax to its ultimate purchasers.

(b) The defendant has indicated that it has no objection to the subsequent filing by the plaintiff of additional customer consents until such time as the amount of refund, if any, is determined pursuant to an order of the court.

23. The amount of manufacturers' excise taxes paid by the plaintiff with respect to Type 604 systems during the period from June 1, 1951, through January 31, 1958, includes $1,264,288.90 paid by the plaintiff with respect to systems leased or sold to the United States, which has declined to execute consents to the making of a refund of any portion of the stated amount of the alleged overpayment.

Respectfully submitted,

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover and judgment is entered to that effect. The amount of recovery will be determined under Rule 47(c).

APPENDIX B

Section 7805 of the Internal Revenue Code of 1954:

(a) *Authorization.*—Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary or his delegate shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

(b) *Retroactivity of Regulations or Rulings.*—The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.

* * * * *

Internal Revenue Service Procedural Regulations:[1]

§ 601.201 Rulings and determination letters.

(a) *General practice and definitions.* (1) It is the practice of the Internal Revenue Service to answer inquiries of individuals and organizations, whenever appropriate in the interest of sound tax administration, as to their status for tax purposes and as to the tax effects of their acts or transactions. One of the functions of the National Office of the Internal Revenue Service is to issue rulings in such matters. * * *

(2) A "ruling" is a written statement issued to a taxpayer or his authorized representative by the National Office which interprets and applies the tax laws to a specific set of facts. Rulings are issued only by the National Office.

[1] See fn. 6, *supra*, p. 9.

The issuance of rulings is under the general supervision of the Assistant Commissioner (Technical) and has been largely redelegated to the Tax Rulings Division.

* * * * *

(5) A "Revenue Ruling" is an official interpretation by the Service which has been published in the Internal Revenue Bulletin. Revenue Rulings are issued only by the National Office and are published for the information and guidance of taxpayers, Internal Revenue Service officials, and others concerned.

* * * * *

(d) *Discretionary authority to issue rulings and determination letters.* (1) It is the practice of the Service to answer inquiries of individuals and organizations, whenever appropriate in the interest of sound tax administration, as to their status for tax purposes and the tax effect of their acts or transactions.

(2) There are, however, certain areas where, because of the inherently factual nature of the problem involved, or for other reasons, the Service will not issue rulings or determination letters. A specific area or a list of these areas is published from time to time in the Internal Revenue Bulletin. Such list is not all inclusive since the Service may decline to issue rulings or determination letters on other questions whenever warranted by the facts or circumstances of a particular case. * * *

* * * * *

(l) *Effect of rulings.* (1) A ruling, except to the extent incorporated in a closing agreement, may be revoked or modified at any time in the wise administration of the taxing statutes. * * * If a ruling is revoked or modified, the revocation or modification applies to all open years under the statutes, unless the Commissioner exercises the discretionary powers given to him

under section 7805(b) of the Code to limit the retroactive effect of the ruling. * * *

* * * * *

(4) A ruling found to be in error or no longer in accord with the position of the Service may be modified or revoked. * * *

(5) Except in rare or unusual circumstances, the revocation or modification of a ruling will not be applied retroactively with respect to the taxpayer to whom the ruling was originally issued or to a taxpayer whose tax liability was directly involved in such ruling if (i) there has been no misstatement or omission of material facts, (ii) the facts subsequently developed are not materially different from the facts on which the ruling was based, (iii) there has been no change in the applicable law, (iv) the ruling was originally issued with respect to a prospective or proposed transaction, and (v) the taxpayer directly involved in the ruling acted in good faith in reliance upon the ruling and the retroactive revocation would be to his detriment. To illustrate, the tax liability of each employee covered by a ruling relating to a pension plan of an employer is directly involved in such ruling. Also, the tax liability of each shareholder is directly involved in a ruling related to the reorganization of a corporation. However, the tax liability of members of an industry is not directly involved in a ruling issued to one of the members, and the position taken in a revocation or modification of ruling to one member of an industry may be retroactively applied to other members of that industry. By the same reasoning, a tax practitioner may not obtain the nonretroactive application to one client of a modification or revocation of a ruling previously issued to another client.

(6) A ruling issued to a taxpayer on a particular transaction applies to that transaction only. If the ruling is later found to be in error or no longer in accord with the position of the

Service, it will afford the taxpayer no protection with respect to a like transaction in the same or subsequent year, except to the extent provided in subparagraphs (7) and (8) of this paragraph.

(7) If a ruling is issued covering a continuing action or a series of actions and it is determined that the ruling was in error or no longer in accord with the position of the Service, the Commissioner ordinarily will limit the retroactivity of the revocation or modification to a date not earlier than that on which the original ruling was modified or revoked. To illustrate, if a taxpayer rendered service or provided a facility which is subject to the excise tax on services or facilities, and in reliance on a ruling issued to the same taxpayer did not pass the tax on to the user of the service or the facility, the Commissioner ordinarily will restrict the retroactive application of the revocation or modification of the ruling.

(8) A ruling holding that the sale or lease of a particular article is subject to the manufacturers excise tax or the retailers excise tax may not revoke or modify retroactively a prior ruling holding that the sale or lease of such article was not taxable, if the taxpayer to whom the ruling was issued, in reliance upon such prior ruling, parted with possession or ownership of the article without passing the tax on to his customer. Section 1108(b), Revenue Act of 1926.

(9) With respect to Revenue Rulings published in the Internal Revenue Bulletin, taxpayers generally may rely upon such rulings in determining the rule applicable to their own transactions and need not request a specific ruling applying the principles of a published Revenue Ruling to the facts of their particular cases where otherwise applicable. * * * Revenue Rulings published in the Internal Revenue Bulletin ordinarily are not revoked or modified retroactively.

* * * * *

The introduction to the Cumulative Bulletin contains the following:[a]

* * * * *

> Except where otherwise indicated, published rulings and procedures apply retroactively. * * *
>
> Revenue Rulings and Revenue Procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations (including Treasury Decisions), but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose. No unpublished ruling or decision will be cited or relied upon by any officer or employee of the Internal Revenue Service as a precedent in the disposition of other cases.

* * * * *

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[a] See fn. 6, *supra*, p. 9.

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No. 820

Supreme Court of the United States

OCTOBER TERM, 1965

UNITED STATES OF AMERICA, *Petitioner,*

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENT IN OPPOSITION

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January 1966

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 820

UNITED STATES OF AMERICA, *Petitioner,*

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether it was an abuse of the discretion confided to him by Section 7805(b) of the Internal Revenue Code for the Commissioner of Internal Revenue, with knowledge of all the relevant circumstances including respondent's request for parity of treatment which was pending before him for nearly two and a half years, to apply an excise tax to certain computer systems manufactured by respondent while at the same time excusing respondent's competitor from payment of the same tax on identical systems.

STATUTE INVOLVED

Section 7805(b) of the Internal Revenue Code provides:

> "(b) *Retroactivity of Regulations or Rulings.*—The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect."

STATEMENT

During the years involved here respondent IBM and Remington Rand were the two principal manufacturers and marketers of electronic computers. IBM's Type 604 computer systems and Remington's Univac 120 and 60 systems were identical in all significant respects. (Pet., p. 31a). From 1951 until April 1955 both companies collected from their customers and paid, in respect of these systems, a 10 per cent manufacturers excise tax imposed by Section 4191 of the Internal Revenue Code of 1954 and its predecessor section on the sale or lease of certain named "business machines."[1] (Pet., pp. 31a, 37a-38a).

On April 13, 1955, Remington requested a ruling from the Commissioner of Internal Revenue that its Univac computers were not "business machines" and hence were not subject to tax. Two days later, on April 15, the Commissioner issued such a ruling in the form of a telegram from the Chief of the Excise Tax Branch to Remington, which thereupon ceased collecting the tax from its customers and paying it to the Government. (Pet., p. 32a).

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[1] This tax has since been repealed. Excise Tax Reduction Act of 1965, § 206, 79 Stat. 140.

IBM learned of this ruling from its customers and on July 13, 1955, wrote the Internal Revenue Service requesting a similar ruling for its identical Type 604 computers. IBM's letter was captioned *"Urgent! Please Expedite."* It referred to Remington's ruling and pointed out the identity of the two companies' systems. In view of the grave competitive implications of different tax treatment of these identical and competing systems, IBM requested the Service to rule immediately and to inform IBM of its ruling by collect telegram. (Pet., pp. 32a-33a).

It was at this point, at the latest, that the Commissioner was put on notice that the two competitors were being treated differently. Both Remington and IBM submitted with their ruling requests material descriptive of the systems as to which rulings were sought. (Pet., pp. 2a, 32a-33a). The material was extensive and made clear that the systems were identical for tax purposes, a fact at no time questioned by the Service. Moreover, the Commissioner knew that on the basis of his ruling Remington was protected by Section 1108(b) of the Revenue Act of 1926, 44 Stat. (Pt. 2) 114, which provides that an excise tax may not be recovered from a manufacturer who, in reliance on a ruling, fails to collect the tax from its customers. See Treas. Reg. § 601.201(1)(8).

Upon his receipt of IBM's request of July 13, 1955, there were three possible rational courses of action open to the Commissioner. He could have (1) resolved doubts as to the taxability of both systems promptly and put his decision into effect as to both competitors. Or, if he found it impossible to reach a prompt decision, he could have either (2) given IBM

a ruling identical to Remington's, knowing that if he were later to decide the systems were taxable he could issue a new prospective ruling; or (3) rescinded Remington's ruling and compelled both competitors to act at their peril while he made up his mind. He then could have made his ultimate decision effective as to both competitors, retroactively or prospectively as the circumstances warranted.

The Commissioner did none of these things. He took no action on IBM's request for nearly two and a half years and allowed Remington's ruling exempting its systems from tax to remain in effect for that period and longer. As the Commissioner later explained, again through the Chief of the Excise Tax Branch, the Service entered upon an "extensive study of the question of the taxability of electronic calculating or computing equipment . . . ."[2] (Pet., p. 36a). Throughout the period of this study IBM necessarily continued to collect and pay the tax, since if it failed to

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[2] The inference that might be drawn from the Government's repeated references to taxes "concededly owed" (Pet., p. 2; see also *id.* at 5, 14) that there was never any doubt that a tax was due is wholly unfounded. Remington's ruling of nontaxability was signed by a high official, the Chief of the Excise Tax Branch of the Internal Revenue Service. Moreover, the Service had a genuine problem in determining to what extent a tax on business machines first enacted in 1941 should apply to electronic computers not conceived of at that time. Its difficulties in this respect persisted beyond the time that it finally resolved the question of the taxability of the systems involved in this suit. The complexity of the question was reported to Congress in 1960. See Staffs of Joint Committee on Internal Revenue Taxation and Treasury Department, Explanatory Statement on the Technical Amendments Bill of 1960 (H.R. 9625 and H.R. 9626), at 11 (1960); 106 Cong. Rec. 13172 (1960).

do so and were eventually held liable it would have been wholly impracticable for it to recoup the amounts of tax not passed on to its customers. Remington, being protected by its ruling, did not collect or pay the tax on its identical and competing machines. During this lengthy period, then, the effect of the Service's action on behalf of Remington and its studied inaction with respect to IBM was to impose on IBM an added cost equal to 10 per cent of the sales price. The result was a 10 per cent penalty on a purchaser who chose to purchase or lease the same system from IBM rather than Remington.

During the two-and-a-half-year period first IBM and then Remington filed claims for refunds of excise taxes paid on their respective systems prior to the time of Remington's ruling. The Commissioner was as silent on IBM's claim for a refund as he was on its urgent request for a ruling. However, in July 1956 the Commissioner granted Remington's later-filed refund claim and returned to Remington an amount representing taxes collected and paid by it from 1952 to 1955. (Pet., pp. 37a-38a).

On May 1, 1957, the Chief of the Excise Tax Branch wrote Remington that, on further consideration, the Service had concluded that the computer systems in question were taxable as business machines. The Service therefore proposed to revoke, prospectively only, its ruling of April 15, 1955. (Pet., pp. 33a-34a). However, the letter continued, "we will withhold further action on the matter for a period of thirty days from the date of this letter in order to afford you an opportunity, should you so desire, of submitting a pro-

test or requesting a hearing in the case." Remington took advantage of this offer, both conferring with the Service and subsequently submitting its views in writing. (Pet., pp. 34a-35a). On December 3, 1957, the Service wrote Remington that it had finally concluded that the computers were taxable. The Service, however, exercised its discretion under Section 7805(b) by providing that the tax would apply only to transactions occurring on and after February 1, 1958. (Pet., pp. 36a-37a). The Service was not barred by any statute from recovering the amount refunded to Remington in 1956 representing taxes paid before Remington received its ruling, but it deliberately decided, by making the revocation wholly prospective, to forgo the opportunity to reclaim this amount.[3]

On November 26, 1957, the Service finally acted on the request for a ruling that IBM had filed more than two years before with an urgent plea for equality and expedition. The Service denied the request for a favorable ruling and stated its conclusion that IBM's systems were taxable. The ruling, unlike the contemporaneous ruling to Remington, was made retroactive. (Pet., pp. 35a-36a). The communications to IBM and Remington left no doubt that the responsible officials knew that identical systems of competing manufacturers were involved. Remington was informed that its ruling of April 1955 was being revoked "to correct a certain competitive irregularity which now exists," and IBM was told that "the manufacturer of the machines which compete with and are similar to" IBM's machines "is being appropriately advised by us re-

[3] Section 1108(b) of the Revenue Act of 1926 (p. 3, *supra*) was not applicable to the amount refunded, and the statute of limitations had not run.

garding the taxability of such machines of its manufacture."

IBM in April 1958 filed a second refund claim for the period June 1, 1955, to January 31, 1958, the date after which the Commissioner commenced to exact from Remington the tax that IBM had been paying all along. The Commissioner took no action on either this claim or the refund claim IBM had filed back in 1955 until February 3, 1959, when he denied both of them. (Pet., p. 38a).

As a result of these events, IBM was held liable for the 10 per cent excise tax on all of its systems of the types involved in this litigation that were sold or leased during the period June 1951 through January 1958. Remington was absolved of the tax on the identical systems of its manufacture for this period—for the period after April 1955 by the Service's ruling of that month which was later revoked prospectively only, and for the period prior to April 1955 by the refund the Service awarded to Remington in July 1956 on the basis of that ruling.

IBM brought this suit in the Court of Claims for the amounts it would have received as refunds, or would have been absolved from paying, had the Commissioner accorded it equal treatment with Remington. That court held in favor of IBM on the ground that in "the totality of the circumstances" presented (Pet., p. 10a), which were entirely of the Commissioner's own making, it was an abuse of the discretion delegated by Section 7805(b) of the Internal Revenue Code for the Commissioner in applying his ultimate determination to IBM to "opt for retroactivity" where non-retroactivity was "imperative" (Pet., p.

18a). Some 3,200 customers of IBM have executed the consents provided for in Section 6416(a)(1) of the Code, and IBM has agreed to pass on to them by far the greater part of any recovery it has—all except about $252,000 in taxes paid by it on systems put to its own taxable use.

REASONS FOR DENYING THE WRIT

The decision of the court below is a clearly correct application of an established principle to a highly particularized and aggravated factual situation. The situation is that the Commissioner of Internal Revenue knowingly and without excuse or explanation created a gross inequality in the administration of the tax laws, allowed it to persist over a long period and then failed to use the authority Congress had given him to correct the inequity he had created. In holding that the Commissioner may not lawfully act in such an arbitrary manner, the decision of the court below does not conflict with any decision of any court and is entirely consistent with the principles governing the Commissioner's exercise of discretion under Section 7805(b) of the Code, as laid down by this Court in *Dixon* v. *United States,* 381 U.S. 68, and *Automobile Club of Michigan* v. *Commissioner,* 353 U.S. 180. Neither the decision itself nor the inferences reasonably to be drawn from it pose any threat to the system under which the Internal Revenue Service issues letter rulings. Accordingly, review by this Court is not warranted.

1. The Government contends that this Court's decision last term in *Dixon* v. *United States, supra,* "compels the conclusion" that the holding below is

incorrect. (Pet., p. 7). The contention is unfounded; the decision below is entirely consistent with *Dixon*.

In *Dixon*, the Commissioner of Internal Revenue had acquiesced in a Tax Court decision, *George Peck Caulkins*, 1 T.C. 656 (1943), *aff'd*, 144 F.2d 482 (6th Cir. 1944), holding proceeds from the retirement of a certain type of debt security taxable as capital gains. Subsequently, the Commissioner ruled that the proceeds from a class of transactions that included, but was broader than, the type of transaction involved in *Caulkins* were taxable as ordinary income. This ruling was applied retroactively except that as to the subclass of transactions involved in *Caulkins* it was applied prospectively only.

The petitioners in the *Dixon* case had realized gains which the Commissioner's ruling made taxable as ordinary income. They contended that he should have given them equal treatment with the holders of the *Caulkins* securities. The petitioners also made the quite separate contention that, wholly apart from their claim to equal treatment, the Commissioner abused his discretion in making his later ruling retroactive as to *anyone* who had relied on the earlier acquiescence.

The Government here quotes and relies on what the Court ruled in answer to the second of these contentions: that "the Commissioner's acquiescence in an erroneous decision, published as a ruling, cannot in and of itself bar the United States from collecting a tax otherwise lawfully due." (Pet., p. 6). But this holding is inapplicable and irrelevant here. The right of the Commissioner to make his rulings retroactive, as long as no discrimination is involved, was not at issue in this case. It is the portion of the *Dixon*

opinion that deals with the argument founded on alleged discrimination that is relevant here.

In its discussion of this point the Court recognized, without indicating any disagreement, the principle that " 'the Commissioner cannot tax one and not tax another without some rational basis for the difference,' " 381 U.S. at 77 n. 9, and cited a number of cases that support the principle, including two Court of Claims decisions that the Government calls in question here. *Exchange Parts Co.* v. *United States,* 279 F.2d 251 (Ct. Cl. 1960); *Connecticut Ry. & Lighting Co.* v. *United States,* 142 F. Supp. 907 (Ct. Cl. 1956). (See Pet., pp. 14-15.)

The Court then considered whether the Commissioner had in fact taxed one group of taxpayers differently from another without some rational basis for distinguishing them. It held that he had not, since the circumstances of the two groups of taxpayers and the transactions were not so similar as to require the Commissioner to treat them alike. The *Caulkins* decision, the Court held, had been based on a quite limited rationale and could not fairly be extended to the securities owned by the petitioners and to the type of transaction in which they had engaged. The Court held that the petitioners had the burden of showing that the *Caulkins* securities "could not rationally be distinguished from" their own, 381 U.S. at 79, and had not sustained this burden.

Thus, a premise of the Court's analysis in *Dixon* is that, in determining whether the Commissioner had abused his discretion, it was material to decide whether the petitioners there and the taxpayers who received non-retroactive rulings owned securities that "could

not rationally be distinguished." The same principle had previously been recognized by this Court in *Automobile Club of Michigan* v. *Commissioner,* 353 U.S. 180. In sustaining an exercise of the Commissioner's power to make a tax ruling retroactive in that case, the Court was careful to inquire whether all taxpayers similarly situated had been treated equally in the making of the ruling. 353 U.S. at 185-86.

In the present case it is conceded that IBM and Remington were similarly situated in all relevant respects, that their computer systems were identical for tax purposes and that the transactions involved were identical. There is no conflict in legal principle between this case and *Dixon;* it is simply that the elements of discrimination and resulting abuse of discretion that characterize the Commissioner's conduct here were not present in *Dixon.*

2. The decision below rests upon an interpretation of Section 7805(b) of the Internal Revenue Code. The same statute governed the decisions in the *Dixon* and *Automobile Club* cases. Plainly that section vests the Secretary of the Treasury's delegate, the Commissioner of Internal Revenue, and his staff with discretionary authority to make rulings relating to the internal revenue laws retroactive or non-retroactive as circumstances seem to counsel. Like any other discretionary power, this authority is subject to abuse. While the petition nowhere squarely admits this, it is clear that abuse of discretion in the administration of Section 7805(b) is reviewable by the courts on familiar principles. This Court so held in the *Automobile Club* case. And as we have indicated, the Court there recognized further that whether taxpayers similarly situated are afforded equal treatment is a highly relevant

factor in determining whether discretion has been abused or not:

> "We must, then, determine whether the retroactive action of the Commissioner was an abuse of discretion in the circumstances of this case .... The Commissioner adopted the General Counsel's interpretation and proceeded to apply it, effective from 1943, *indiscriminately* to automobile clubs. We *thus* find no basis for disagreeing with the conclusion . . . that the Commissioner, *having dealt with petitioner upon the same basis as other automobile clubs,* did not abuse his discretion." 353 U.S. at 185-86. (Emphasis added.)[4]

Other decisions have likewise recognized that conscious, aggravated discrimination between taxpayers similarly situated is a factor to be considered in determining whether the Commissioner has abused his discretion under Section 7805(b).[5] The decision below therefore is no novelty or departure from consistent interpretations of the tax laws.

The only question in the present case was whether on the facts presented the Commissioner had abused

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[4] Other cases that have recognized the reviewability of discretionary determinations under § 7805(b) are Lesavoy Foundation v. Commissioner, 238 F.2d 589 (3d Cir. 1956), and Goodstein v. Commissioner, 267 F.2d 127 (1st Cir. 1959); see generally Caplin, "Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles," N.Y.U. 20th Inst. on Fed. Tax. 1, 17-26 (1962), and Lynn & Gerson, "Quasi-Estoppel and Abuse of Discretion as Applied Against the United States in Federal Tax Controversies," 19 Tax L. Rev. 487, 505-16 (1964).

[5] Exchange Parts Co. v. United States, 279 F.2d 251 (Ct. Cl. 1960); Connecticut Ry. & Lighting Co. v. United States, 142 F. Supp. 907 (Ct. Cl. 1956); City Loan & Savings Co. v. United States, 177 F. Supp. 843 (N.D. Ohio 1959), *aff'd,* 287 F. 2d 612 (6th Cir. 1961); Brecklein v. Bookwalter, 231 F. Supp. 404 (W.D. Mo. 1964).

his discretion. The court below held that he had. That holding was clearly justified by the evidence and by the court's findings. The holding was upon a record showing what must be a nearly unique course of delay and mistakes on the part of the Service resulting in "a manifest and unjustifiable discrimination against" IBM. (Pet., p. 17a). The Government does not assert even now that there was any rational basis for the course of action followed by the Commissioner. Its defense rather is that the taxes in question were levied by Congress, and accordingly the manner in which the Commissioner discriminated between taxpayers is quite immaterial.

In so defending, the Government ignores Section 7805(b) and the powers it creates in the administration of the tax laws. That section is part of the Internal Revenue Code; it represents a decision by Congress that in certain circumstances taxes, even though they would otherwise be due, should not be collected where their collection would be inequitable and unfair. The Government simply ignores this decision by Congress when it repeatedly describes the holding below as, for example, permitting taxpayers "to escape taxes which they owe" (Pet., p. 16). Section 7805(b) bears just as much on what taxes are "owed" as any other section of the tax code. It authorizes, indeed enjoins, the Commissioner to make a ruling prospective when considerations of fairness and equity so require.[6] If the circumstances are such, as they were in this case, that it was an abuse of dis-

[6] As the Court observed in Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 184, § 7805(b) empowers the Commissioner "to limit retroactive application to the extent necessary to avoid inequitable results."

cretion for the Commissioner to make his ruling retroactive, then the taxes were not "owed"; to the contrary, they were improperly paid and should be refunded.

The Commissioner regularly and in the routine discharge of his administrative duties forgives taxes that, in the terms of the petition here, are "owed." He does so when he makes a ruling effective prospectively on the ground that a prior ruling or rulings have been inconsistent with it. Moreover, it is not the case that the Commissioner so exercises his discretion under Section 7805(b) only when the prior ruling has been published.[7] In many instances he has made a ruling prospective only for an entire industry because of inconsistency with prior unpublished rulings issued to one or several members thereof or a position informally taken. See, *e.g., Rev. Rul.* 57-611, 1957-2 Cum. Bull. 730; *Rev. Rul.* 58-582, 1958-2 Cum. Bull. 768; *Rev. Rul.* 59-112, 1959-1 Cum. Bull. 307; *Rev. Rul.* 59-262, 1959-2 Cum. Bull. 249; *Rev. Rul.* 60-391 1960-2 Cum. Bull. 299.

The Government makes much of the fact that there was no "reliance" by IBM in this case. (Pet., pp. 13-14). As the rulings cited in the preceding para-

[7] The Government attempts to attach significance to the fact that the rulngs here in question were not published (Pet., pp. 7-10), implying that the ordinary limitations on the exercise of discretion can therefore be ignored. The short answer to this suggestion is that § 7805(b) makes no distinction between published rulings and rulings issued to particular taxpayers by letter or otherwise and thus gives the Service the same discretionary authority and responsibility as to retroactivity in the case of either type of ruling. Rulings are published when they are thought to have significant value as precedents. Naturally, a ruling affecting only two taxpayers would not be selected for publication.

graph make clear, the Commissioner does not insist upon reliance, in the sense of a person's not having paid a tax, in his own excise-tax rulings practice.[8] It is enough to justify prospective treatment for all that there has been a private ruling or a position taken that was generally known, and no showing of actual reliance by any particular taxpayer is required. Here, of course, the ruling to Remington was known to all who were interested, the two competitors and their customers. But at bottom reliance, as the term is customarily used in the cases, is irrelevant to excise-tax cases. Reliance upon a ruling as to the income-tax consequences of a prospective transaction may well be an element in proving that harm was caused by the Government's retroactively withdrawing its ruling after the transaction was entered into. In the excise-tax situation the damage caused by having some percentage of the sales price added to a manufacturer's costs is direct and immediate.

Finally, the Government is simply wrong in urging that in no circumstances is the standard of fairness that the Commissioner has adopted for his own guidance judicially enforceable. The Government says that "we know of no legal principle that compels the

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[8] At one time the Commissioner's practice was to require some kind of "reliance," making rulings that reversed positions favorable to taxpayers prospective except that refunds would not be allowed to those who had been paying their taxes. *E.g.*, Rev. Rul. 55-318, 1955-1 Cum. Bull. 509; Rev. Rul. 55-533, 1955-2 Cum. Bull. 642; Rev. Rul. 56-189, 1956-1 Cum. Bull. 503. The practice was abandoned about the time the Court of Claims held that to draw a distinction between a taxpayer who had paid his tax and one who had not was to discriminate arbitrarily and illegally. Connecticut Ry. & Lighting Co. v. United States, 142 F. Supp. 907 (Ct. Cl. 1956); see also Exchange Parts Co. v. United States, 279 F.2d 251 (Ct. Cl. 1960) (involving Rev. Rul. 56-189, *supra*).

Commissioner, once he has erroneously permitted one taxpayer to escape liability, to . . . permit another similarly to escape liability in the name of 'equality of treatment.'" (Pet., p. 11). Mr. Justice Frankfurter has aptly stated the very principle that the Government rejects: "The Commissioner cannot tax one and not tax another without some rational basis for the difference." *United States* v. *Kaiser,* 363 U.S. 299, 308 (concurring).[9] The principle is broader than its expression in Section 7805(b). Even were that section not in the Revenue Code, the constitutional prohibition against knowing and deliberate discrimination between taxpayers identically situated would still apply. Where that principle has been violated, the proper remedy is the refund of the tax discriminatorily collected even though that is the correct tax owed according to the tax law on the statute books. *E.g., Sioux City Bridge Co.* v. *Dakota County,* 260 U.S. 441, *Township of Hillsborough* v. *Cromwell,* 326 U.S. 620.

In summary, the Government does not deny that the Commissioner had power under Section 7805(b), by making his ruling prospective, to correct the effects of his delay of more than two years in ruling on IBM's

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[9] This Court has often recognized that "a cardinal principle of Congress in its tax scheme is uniformity, as far as may be." United States v. Gilbert Associates, Inc., 345 U.S. 361, 364, quoted with approval in United States v. Brosnan, 363 U.S. 237, 241. "We should be slow to attribute to Congress a purpose producing such unequal treatment among taxpayers, resting on no rational foundation." United States v. Gilmore, 372 U.S. 39, 48. "[A]s we have often had occasion to point out, the revenue laws are to be construed in the light of their general purpose to establish a nation-wide scheme of taxation uniform in its application." United States v. Pelzer, 312 U.S. 399, 402.

request for simple competitive parity; it does not forthrightly deny what this Court has held, that exercise of the discretion given to the Commissioner by Section 7805(b) is reviewable for abuse. The question, then, comes down to whether the facts here—which were of the Commissioner's own creation—made it an abuse of discretion not to act prospectively in the cases of both competitors instead of retroactively as to one and prospectively as to the other. We submit that the court below was plainly correct on its view of what the facts demanded, so that its decision was an unexceptionable application of principles this Court has held inhere in Section 7805(b).

3. The Government, making no real effort to justify the course of action followed by the Commissioner, a course which even the dissenting judge below regarded as "deplorable" (Pet., p. 30a), seeks review by this Court largely on the ground that the decision below will necessitate significant changes in the system under which the Internal Revenue Service issues letter rulings. (Pet., pp. 11-13, 14-16). To the extent that any changes are necessary to prevent a recurrence of what has happened here, surely they are in order and if they have not been made should be made as quickly as possible. We do not believe that the Government seeks a license to repeat with impunity what the Commissioner has done and has failed to do here.

Presumably, however, the Government is apprehensive that broader changes will be necessitated. It sees the decision below as "fraught with alarming ramifications" prejudicial to the administration of the tax laws. (Pet., p. 11). At worst, those ramifications, which are elsewhere described as posing a "serious

threat" to the rulings system (Pet., p. 5), are something less than horrendous. It is claimed that fewer rulings can be issued if a ruling is to be regarded as anything more than a private compact between the Service and an individual taxpayer (Pet., pp. 2, 8, 12), and that more time will be required to process rulings (Pet., p. 16).[10]

Even these consequences, however seriously they may be viewed, flow not from the decision of the court below but from what the Government perceives quite erroneously as the "far-reaching implications" of the decision. (Pet., p. 14). The decision of the court below does not hold or imply, as the Government repeatedly asserts, that a taxpayer has the right to take advantage of any error made by the Service in dealing with any other taxpayer. The court carefully distinguished the line of cases that includes *Weller* v. *Commissioner,* 270 F.2d 294 (3d Cir. 1959), *cert. denied,* 364 U.S. 908, quoted by the Government (Pet., p. 12), holding that, as the court put it, "one taxpayer has no right to rely on an incorrect private ruling to another" (Pet., p. 19a). The court did not decide "that IBM had a right to invoke or rely upon Remington's private ruling" but rested on the different ground that IBM was entitled to have its ruling in

[10] It is hardly the province of this Court or any other court to tell the Revenue Service how many rulings it should issue or how much time it should spend on each ruling. It is the province of the courts, however, to review administrative action whether by the Commissioner of Internal Revenue or any other official of the executive department to protect against abuse of discretion. In a limited number of situations, such abuse may be found. Where it is found, it is surely the function of the Executive to effect such corrections in its procedures as appear necessary or appropriate to prevent repetition.

response to its request "controlled by the standard of equality and fairness incorporated in Section 7805 (b)." (Pet., p. 20a).

That standard, the court properly held, required non-retroactivity, not because the Service had "erred" with respect to Remington, but because of "the totality of the circumstances" (Pet., p. 18a) surrounding its treatment of IBM. The Commissioner had, and let pass, a number of opportunities to act without incurring liability to IBM or any other taxpayer. Ultimately, it was what the Commissioner did and failed to do to IBM and not the error he made in dealing with Remington that gave rise to the liability found by the court below.

The decision below, therefore, neither in its holding nor in its implications, allows a taxpayer to take advantage of any error made by the Service in favor of another taxpayer. Like most cases involving an alleged abuse of discretion, this case turns on its particular facts. Those facts did not consist of a single error of law or fact made by the Service as to the proper construction of the taxing statute. They presented rather a systematic and consistent course of substantive and procedural discrimination extending over a long period and carried out with full knowledge of all the relevant facts.[11] If the decision stands, we have no doubt that the Government will be the first to deny that it represents a "holding that a taxpayer may escape liability for tax it owes because of an erroneous

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[11] As the court below observed, there is no charge of "malevolence" on the part of the Government officials concerned. (Pet., p. 17a).

ruling given to another taxpayer." (Pet., p. 14). The Court of Claims has had no difficulty in distinguishing this case when, in subsequent cases, it was argued to be controlling in circumstances where an abuse of discretion had not been established. See *Knetsch* v. *United States,* 348 F.2d 932, 940 n. 14 (Ct. Cl. 1965); *Bornstein* v. *United States,* 345 F.2d 558, 564 n. 2 (Ct. Cl. 1965).

Neither the holding nor the fair implication of the decision of the court below is that the Government is accountable for every error, inconsistency or inadvertence committed in the administration of the tax laws. What the decision does mean is that the Commissioner in the exercise of his considerable powers, including his authority under Section 7805(b), must act rationally in the light of all the circumstances known to him. One must assume, and surely hope, that the behavior of the Service here represents a wholly atypical departure from the standards of administrative efficiency and fairness it normally displays. The court below invoked a well-established principle peculiarly suitable for correcting aberrations such as that involved here—judicial review to correct abuse of administrative discretion. Surely the Revenue Service is not and should not be immune from such review. Indeed, at least since *Automobile Club of Michigan* v. *Commissioner,* 353 U.S. 180, was decided, it should have known that there were limitations on the exercise of discretion by the Commissioner under Section 7805(b). It is, therefore, hardly credible that a decision that there has been an abuse of discretion in this highly particularized situation will entail sweeping changes in the operations of the Service.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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